hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will support all of the dealers in that line-make in the relevant market area. Establishing a franchised dealer in a relevant market area to replace a franchised dealer that has not been in operation for more than two years shall constitute the establishment of a new franchise subject to the terms of this subdivision. The two-year period for replacing a franchised dealer shall begin on the day the franchise was terminated, or, if a termination hearing was held, on the day the franchisor was legally permitted finally to terminate the franchise. This subdivision shall not apply to (i) the relocation of an existing dealer within that dealer's relevant market area if the relocation site is to be more than ten miles distant from any other dealer for the same line-make; (ii) the relocation of an existing dealer within that dealer's relevant market area if the relocation site is to be more distant than the existing site from all other dealers of the same line-make in that relevant market area; or (iii) the relocation of an existing new motorcycle dealer within two miles of the existing site of the relocating dealer.

No new or additional motorcycle dealer franchise shall be established in any county, city or town unless the manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative gives advance notice to any existing franchised dealers of the same line-make. The notice shall be in writing and sent by certified mail, return receipt requested, at least forty-five days prior to the establishment of the new or additional franchise. Any existing franchise dealer may file a protest within thirty days of the date the notice is received. The burden of proof in establishing inadequate representation of such line-make motorcycles

> *shall be on the manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative.*

It is the Second Paragraph of *Virginia Code* § 46.2-1993.67(5), which is emphasized above, that is at issue in this matter. There is no issue concerning the constitutionality of the First Paragraph of *Virginia Code* § 46.2-1993.67(5).

INTRODUCTION

To determine the constitutionality of a legislative act is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981).[3] Although this Court has the final word on the meaning of the Constitution, *see Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the exercise of the power of judicial review reflects a fundamental distrust of the democratic process. *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 4-5 (1982). Yet, if, as Tocqueville suggested, every political issue becomes a constitutional question, *see* Alexis de Tocqueville, *Democracy In America*, 126 (Richard Hefner, ed., Mentor Books 1984) (1835), then there is a danger that this Court will be transformed into a "bevy of platonic guardians" who constantly substitute their judgment for the policy choices of elected officials. *See Griswold v. Connecticut*, 381 U.S. 479, 528 (1965) (Black, J., dissenting) (quoting Learned Hand, *The Bill of Rights* 70 (1958)). Recognizing that "courts are not well

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[3] Of course, *Rostker* arose in the context of a challenge to an act of Congress, rather than an act of a state legislature. However, given the essential role of the States in our constitutional system, *see Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52, 769 (2002), a constitutional challenge to a state statute is no less grave or delicate.

suited" to "scrutinize the efficacy of a vast array of state and federal regulations," and that judges should not "substitute their predictive judgments for those of elected legislatures and expert agencies," *Lingle v. Chevron*, 125 S. Ct. 2074, 2085 (2005), this Court has established two significant limitations on the power of judicial review.

First, this Court has limited the contexts in which federal courts will second-guess the policy judgments of state officials. Constitutional challenges generally focus on the explicit terms of the statute or policy, not on the indirect effects. Therefore, a policy mandating that racial groups be treated differently is unconstitutional, *see Gratz v. Bollinger*, 539 U.S. 244, 275 (2003), but a policy that merely disproportionately affects racial minorities is of no constitutional consequence. *See Washington v. Davis*, 426 U.S. 229, 248 (1976). Similarly, a statute that discriminates against interstate commerce is almost *per se* unconstitutional, *see Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997), but a statute that merely disproportionately affects out-of-state interests causes no constitutional concern. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

Second, rather than addressing every conceivable application of a statute, this Court generally has limited constitutional challenges to the specific claims of the litigants. "Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks." *Sabri v. United States*, 541 U.S. 600, 608-09 (2004). Consequently, facial challenges – where the litigant raises claims of persons not before the court in order to invalidate the statute on its face – are limited to claims involving

fundamental rights and the enforcement of the Constitution's structural limits.[3] *See Id.* at 611-12 (citing cases). For example, while it is certainly appropriate to entertain a facial challenge to a statute that discriminates against interstate commerce on its face or in its practical effect, *see Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), it is inappropriate to allow a facial challenge to a statute which is neutral toward interstate commerce.

This Petition provides two opportunities for this Court to reaffirm and expand these limitations on the power of judicial review.

First, it offers an opportunity to limit further the contexts where federal courts will second-guess state legislatures. Under this Court's current jurisprudence, a state law that does not discriminate against interstate commerce on its face or in its practical effect is still subject to the *Pike* balancing test. *See C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 390 (1994). As a result, neutral statutes – such as the one at issue in this proceeding – are often invalidated using the *Pike* balancing test. *See Edgar v. MITE Corp.*, 457 U.S. 624, 643-44 (1982); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 678 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444-48 (1978); *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 352-54 (1977); *Pike*, 397 U.S. at 146. Yet, the *Pike* balancing test, like the test at issue in *Lingle*, raises "serious practical difficulties" and undermines the "reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions." *Lingle,* 125 S. Ct. at 2085. Consequently, the Commissioner believes that the *Pike* test should be abandoned. Instead, this Court should sustain a State's

[3] At times, this Court has referred to facial challenges as overbreadth claims. *See Sabri*, 541 U.S. at 608-10.

economic regulatory measures against a Dormant Commerce Clause challenge unless the statute: (1) facially discriminates against interstate commerce; or (2) is indistinguishable from statutes previously invalidated by this Court. *American Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419, 2426 (2005) (Scalia, J., concurring); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., joined by Thomas, J., concurring); *Intel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 78-79 (1992) (Scalia, J., concurring); *Bendix Autolite Corp. v. Midwesco*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring). *See also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring) (suggesting that the *Pike* test is inappropriate and should be abandoned). Where, as in these proceedings, the statute is neutral toward interstate commerce and is easily distinguishable from statutes previously invalidated by this Court, there is no need to apply *Pike* or any other test.

Second, this Petition offers an opportunity to limit further facial challenges. Under this Court's current jurisprudence, a statute that does not discriminate against interstate commerce on its face or in its practical effect can still be challenged *on its face* using the *Pike* test. *See Edgar*, 457 U.S. at 643-44; *Raymond Motor Transp., Inc.*, 434 U.S. at 444-48. The Commissioner believes that facial challenges under the Dormant Commerce Clause should be limited to those statutes discriminating against interstate commerce or statutes indistinguishable from statutes previously invalidated by this Court. In other words, if this Court continues to apply the *Pike* balancing test, it should do so only on an as-applied basis. A neutral statute should not be invalidated on its face simply because there are many applications where the incidental burdens on interstate commerce outweigh the benefits to the State.

STATEMENT OF THE CASE

1.a. *Virginia Code* § 46.2-1993.67(5), as a whole, protects Virginia's existing motorcycle dealers, such as Respondent Jim's Motorcycle, Inc. ("Jim's Motorcycle") by regulating the ability of motorcycle distributors like Respondent Yamaha Motor Corp., USA ("Yamaha") to establish new dealerships in Virginia. Put another way, it protects small businesses – motorcycle dealers – from large, often multi-national corporations – the motorcycle manufacturers. The statute consists of two paragraphs. The First Paragraph, which is not at issue in these proceedings, limits a motorcycle distributor's ability to establish a new dealership in the "relevant market area" of an existing dealer. It defines the "relevant market area" as a circular area within a 10, 15, or 20 mile radius, depending on population density. *App.* at 30. The Second Paragraph, which is at issue in these proceedings, expands the geographic area protected by the statute to include any area in which the existing dealer can demonstrate that he is actually representing the line-make in a substantial way. As interpreted by the Supreme Court of Virginia, the clear effect of the Second Paragraph is to allow protests to be filed by dealers outside the arbitrary mileage restrictions of the First Paragraph. *App.* at 87.

b. Jim's Motorcycle is one of twenty-six authorized Yamaha dealerships in Virginia, and is located in Bristol, Virginia, a small city in southwest Virginia. In 2000, Yamaha notified Jim's Motorcycle that it intended to establish a twenty-seventh authorized dealership and to place that new dealership in Rosedale, Virginia, at a location that is approximately twenty-six miles from the Jim's Motorcycle location in Bristol, Virginia.

2. Exercising its rights under the Second Paragraph of *Virginia Code* § 46.2-1993.67(5), Jim's Motorcycle filed a

protest as to Yamaha's decision to establish a new dealership in Rosedale, Virginia in October, 2000. Yamaha responded by requesting that the protest be denied without a hearing.[4] On July 6, 2001, the Commissioner ruled that Jim's Motorcycle, the protesting dealer, had sufficient sales in the Rosedale, Virginia area to justify a formal hearing on the merits of its protest.[5]

3. On July 25, 2001, before a hearing on the protest could take place,[6] Yamaha brought this challenge in the United States District Court for the Eastern District of Virginia, seeking: (1) a declaration that the Second Paragraph of *Virginia Code* § 46.2-1993.67(5) is unconstitutional; (2) an order enjoining the Commissioner from enforcing it;[7] and (3) an order enjoining Jim's Motorcycle,

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[4] On April 19, 2001, the Hearing Officer appointed to hear the protest issued a one-page order summarily finding that Jim's Motorcycle was entitled to a hearing and stating that such a hearing would be held at a mutually convenient time. On May 8, 2001, after confirming that the Hearing Officer's order represented the position of the Commissioner and was not subject to interlocutory appeal, Yamaha filed suit in the district court alleging that the Second Paragraph violated the Dormant Commerce Clause. After being informed that the Hearing Officer did not have the authority to issue the order, but that the Commissioner intended to issue an order in the future, Yamaha voluntarily dismissed its suit. *App.* at 26-27.

[5] One month later, on August 6, 2001, the Commissioner issued an amended decision that reached the same conclusions as the earlier decision, but clarified certain matters raised by the parties to the administrative proceeding. *App.* at 36-38.

[6] In October 2001, over two months after its suit, Yamaha filed a "provisional" appeal of the Amended Decision in the appropriate state court. That matter has been stayed pending the resolution of the constitutional challenge to the Second Paragraph.

[7] While it is undisputed that a federal court has jurisdiction to award the requested relief against the Commissioner, the parties dispute the basis for that jurisdiction. The Commissioner believes that a suit seeking to enforce the Dormant Commerce Clause by obtaining declaratory and injunctive relief properly is characterized as a suit

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the existing dealer, from protesting the establishment of a new dealership in Rosedale.[8] After all parties agreed to a stipulated factual record, the district court conducted a bench trial on April 9, 2002. Following the bench trial, the district court concluded that resolution of the constitutional questions depended on the proper interpretation of the Second Paragraph, and, finding no Virginia precedent respecting the proper interpretation, submitted four certified questions to the Supreme Court of Virginia on May 17, 2002.[9]

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under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). In contrast, Yamaha insists that such a suit is actually a claim under 42 U.S.C. § 1983. The distinction is relevant only in the context of whether Yamaha ultimately can recover attorneys fees under 42 U.S.C. § 1988.

[8] Although it is clear that Yamaha can obtain the requested relief against the Commissioner, it is unclear that it can obtain the requested relief against Jim's Motorcycle. Nothing in federal law precludes a private entity – such as Jim's Motorcycle – from exercising rights granted by a state statute.

[9] Those certified questions were as follows:

1. Whether the Second Paragraph grants to every existing Virginia franchised dealer of a line-make of motorcycles the right to receive forty-five days' advance notice of, and to protest, the establishment of any new or additional motorcycle dealer franchise of the same line-make in any county, city or town of Virginia, thereby placing on the manufacturer the burden of proving, in a formal evidentiary hearing, 'inadequate representation' of its line-make of motorcycles throughout the Commonwealth before it may proceed to establish that dealership?

2. Whether the Commissioner was correct in interpreting the Second Paragraph in a manner such that only those protesting franchised dealers who make a preliminary showing that they actually are representing, 'in a not insubstantial way,' the line-make of motorcycles in the 'county, city or town' where the proposed new or additional dealer would be located will qualify for a formal evidentiary hearing in which the manufacturer would

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4. The Supreme Court of Virginia accepted the four certified questions and reached several conclusions.[10] First, the state high court concluded that the primary objective of the Second Paragraph was to afford added protection to motorcycle dealers, beyond the relevant market area protection provided by the First Paragraph. *App.* at 81. Second, it found that the Commissioner has discretion in determining whether a formal evidentiary hearing would be appropriate. *App.* at 86. Third, the Virginia tribunal held that the phrase "any existing franchised dealer" in the Second Paragraph means any existing dealer of the same line-make of motorcycles in Virginia. *App.* at 86. Fourth, while expressly rejecting the notion that motorcycle manufacturers had to prove inadequate representation throughout Virginia, the state high court did find, that in some circumstances, the question of inadequate representation went beyond the same county, city, or town in which the proposed new dealership would be located. *App.* at 87.

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bear the burden of proving 'inadequate representation' of that line-make, by the protesting franchised dealer, in that 'county, city or town?'

3. Whether the Second Paragraph should be interpreted to make the advance notice and protest rights granted therein applicable to only existing franchised dealers of a line-make of motorcycles which are located in the same 'county, city or town' in which a proposed new or additional motorcycle dealer franchise of the same line-make would be established, and to limit the burden on the manufacturer to proving 'inadequate representation' of its line-make merely in that 'county, city or town?'

4. If none of the three aforementioned interpretations of the Second Paragraph is correct, what is the correct interpretation of the statute?

[10] The Supreme Court of Virginia answered the first and third questions, restated the second question and answered it, and declined to answer the fourth question. *App.* at 88.

5. After the Supreme Court of Virginia answered the certified questions, the district court, at the request of the parties, allowed additional discovery to be conducted on the question of the burdens placed on interstate commerce by the Second Paragraph. The district court then conducted evidentiary hearings on February 14, 2003 and on March 1, 2003. On July 31, 2003, the district court rendered a decision upholding the Second Paragraph. *App.* at 25-74.

a. In reaching this result, the district court utilized the analytical framework mandated by this Court's decisions. Initially, the district court concluded that the Second Paragraph did not discriminate against interstate commerce on its face or in its practical effect. *App.* at 61-62. Having concluded that the Second Paragraph does not discriminate against interstate commerce, the district court, following the mandates of this Court, then applied the *Pike* balancing test. *App.* at 62-63.

b. Under the *Pike* balancing test, the district court has to determine (1) the nature of the local benefits advanced by the statute; (2) the burden placed on interstate commerce by the statute; and (3) whether the burden is 'clearly excessive' when weighed against these local benefits. *App.* at 63. The district court found that the Second Paragraph had a clear local benefit – providing motorcycle dealers with protection beyond that provided by the First Paragraph. *App.* at 63, 69. The district court also found that there were no cognizable burdens on interstate commerce because of the Second Paragraph. *App.* at 74. In reaching this conclusion, the district court was careful to distinguish between factors that would lead to a finding that a statute discriminated against interstate commerce and factors that would be considered a cognizable burden on

interstate commerce under the *Pike* balancing test.[11] *App.* at 70-71. The district court emphasized that since it had found that there was no discrimination against interstate commerce, it could not consider the alleged discriminatory effects of the statute to be cognizable burdens.[12] *App.* at 71.

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[11] As the district court explained:

> As a preliminary matter, it is necessary to emphasize that the burdens on interstate commerce contemplated by the *Pike* test are different from the "discriminatory effects" considered in connection with the *per se* test. That is, if a state law "discriminates" against out-of-state actors in its practical effect, the enactment is *per se* unconstitutional, and the *Pike* test need not be performed. Unfortunately, courts at all levels of the federal judiciary have not been careful in applying this distinction, and thus have blurred the line between the *per se* test and the *Pike* test by purporting to apply the *Pike* test, when in fact the "burdens on interstate commerce" were discriminatory effects. . . . The independent utility of the *Pike* test, therefore, is limited to those occasions where the regulation in question is non-discriminatory, but nonetheless burdens interstate commerce in a manner that is clearly excessive when compared to the putative local benefits.
>
> The class of burdens that are properly cognizable under the *Pike* test are quite limited. The Supreme Court has been emphatic that the dormant Commerce Clause does not incorporate any specific economic theory and that statutes that may harm consumers under one economic view are not necessarily unconstitutional as a result.

App. at 70-72. (citations omitted).

[12] As the district court explained:

> The limitation on the burdens that are cognizable under the *Pike* test is highly significant in this case because the Second Paragraph does create significant economic burdens chilling the opening of new dealerships and thereby, at least in theory, harms consumers by depriving them of the price benefits of rigorous intrabrand and interbrand competition. These effects, however, all relate to the economic efficacy of the Second Paragraph, and thus are not the type of burdens the *Pike* test is meant to address. Importantly, Yamaha has

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Because there were no such burdens, the local benefits clearly outweighed the burdens. Thus, the Second Paragraph was held to be constitutional. *App.* at 74.

6. On appeal, the Fourth Circuit reversed. Like the district court, the court of appeals concluded that the Second Paragraph did not discriminate against interstate commerce on its face or in its practical effect. *App.* at 14. Like the district court, the Fourth Circuit found that, despite the neutrality of the Second Paragraph, this Court's decisions mandated the application of the *Pike* balancing test. *App.* at 14. Like the district court, the lower court found that the Second Paragraph had a significant local benefit – allowing motorcycle dealers a greater level of protection than that afforded by the First Paragraph. *App.* at 15. Unlike the district court, however, the court of appeals found that the Second Paragraph did not survive the *Pike* balancing test. *App.* at 24. It reached this conclusion for two reasons.

a. First, the Fourth Circuit focused on the fact that the impact of the Second Paragraph fell disproportionately on out-of-state entities. As the lower court explained:

> There are no motorcycle manufacturers located in Virginia. And existing motorcycle dealers, the major in-state interests affected by the provision,

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not demonstrated that the Second Paragraph regulates in an area where there is a "compelling need" for national uniformity.

App. at 74.

There is a significant distinction being made here. The court recognized that the statute burdened the opening of new dealerships, but there was no evidence that it burdened the sale of Yamaha Motorcycles in Virginia; in fact, Yamaha sales increased faster in Virginia than in other States while the statute was in effect. In addition, it is the sale of motorcycles, not the creation of new dealerships, which constitutes the interstate commerce in this case.

> stand to benefit from the law's enforcement. The existing dealers cannot "be relied upon to prevent legislative abuse" because they "ha[ve] been mollified by" the economic protection they currently enjoy. Indeed, the in-state interests actively seek to protect the burdensome law. In 2001 the Virginia Motorcycle Dealers Association asked each franchised dealer in the Commonwealth "to contribute at least $1000 to cover the legal fees for defending our 'best in the nation' franchise laws" and to cover the costs of lobbying the General Assembly. Although those brave enough to try to open new dealerships are likely to be Virginia residents, these few individuals are sure to be outnumbered and out-gunned by the existing dealers. As a result, there is little political check against the possibility of legislative abuse in the form of motorcycle franchise laws that unduly burden commerce.

App. at 22-23. (citations omitted). Under this reasoning, a State that has one or more motorcycle manufacturers could enact the Second Paragraph, but a State that has no manufacturers may not. Thus, the ability to enact legislation is dependent upon a State's corporate residents. Moreover, the fact that the number of vehicles sold in the State may have no relationship whatsoever to the number of dealerships established is apparently irrelevant.

b. Second, the Fourth Circuit was disturbed by the fact that any existing dealer can file a protest as to the establishment of a new dealership of the same line-make anywhere in Virginia. Thus, a dealer in one corner of Virginia could attempt to protest the establishment of a

new dealership in the opposite corner.[13] The lower court described this aspect of the Second Paragraph as:

> . . . a barrier to market entry, that is unparalleled in scope. The Commonwealth has erected this barrier in the absence of evidence that protection in the form of statewide protest rights for every motorcycle dealer was needed. The Commonwealth's only explanation for expanding the protection afforded by the First Paragraph is that motorcycle dealerships tend to sell within a forty-mile radius, which is beyond the First Paragraph's "relevant market" protection of a radius up to twenty miles. The Second Paragraph, of course, did not limit protest rights to dealers within a forty-mile radius of a proposed dealership; it imposed no limit at all. The *Pike* inquiry requires us to consider whether the Second Paragraph's benefits could have been achieved with a less restrictive alternative. We conclude that it could have. The Second Paragraph could have imposed some rational geographic limit on protest rights, but it did not. Under the Second Paragraph as it stands, an existing dealer at one end of Virginia can protest a proposed dealership some 500 miles away at the other end of the state. That is overreaching in the extreme.

App. at 23-24. (citations omitted). In other words, the court of appeals disagreed with the legislature's judgment concerning the size of the geographic area for protests. The Fourth Circuit thought that protests should be confined to

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[13] While the existing dealer has the legal right to file such a protest, as a practical matter, such a protest likely would be summarily dismissed. It is unlikely that a dealer in the southwest corner of Virginia would be able to carry the burden to demonstrate that he was already representing the line-make, in a substantial way, in the northeast corner of Virginia (the Eastern Shore of the Chesapeake Bay).

a relatively small geographic area – there was even a suggestion that forty miles was acceptable – but the legislature believed that the area should be all of Virginia. *App.* at 23-24.

Because there were no local motorcycle manufacturers and because the lower court disagreed with the size of the geographic area for protests, the Fourth Circuit found that the cognizable burdens on interstate commerce exceeded the benefits to Virginia. *App.* at 22. Thus, under the *Pike* balancing test, the Second Paragraph was held unconstitutional.

This Petition for Certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review two important federal questions that have not been, but ought to be, decided by this Court.

First, review should be granted to consider whether the *Pike* balancing test should be abandoned. The *Pike* balancing test is fundamentally flawed in that: (1) it does not provide for sufficient deference to legislative judgments; and (2) it is unworkable in that it is vague and amorphous. This Petition is an excellent vehicle to resolve the question. The *Pike* balancing test is the only reason to question the constitutionality of the Second Paragraph. The application of the *Pike* balancing test in this matter demonstrates its vague and amorphous nature.

Second, review should be granted to determine if a federal court may entertain a facial challenge using the *Pike* balancing test. Facial challenges generally are confined to claims involving heightened scrutiny or questions regarding the Sovereign's power to legislate. Since the *Pike* balancing test involves neither heightened scrutiny nor the States' power to legislate, a facial challenge is

inappropriate. This Petition is an excellent vehicle to resolve the question because the outcome of a challenge to a neutral statute may well be different with an as-applied rather than facial challenge.

I. REVIEW SHOULD BE GRANTED TO CONSIDER WHETHER THE *PIKE* BALANCING TEST SHOULD BE ABANDONED.

Review should be granted to consider whether the *Pike* balancing test should be abandoned. Put another way, this Court should decide if it is necessary to apply the *Pike* test or another test to a statute that does not discriminate against interstate commerce on its face or in its practical effect and that is easily distinguishable from the measures previously invalidated by this Court on Dormant Commerce Clause grounds.

Because "the peoples of the several states must sink or swim together," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), the Commerce Clause contains "a further, negative command, known as the Dormant Commerce Clause," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995), that "create[s] an area of trade free from interference by the States," *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (quoting *Freeman v. Hewit*, 329 U.S. 249, 242 (1946)). Thus, a State may not prohibit the importation of another States' products. *See Philadelphia*, 437 U.S. at 629; *Baldwin*, 294 U.S. at 522-24. Nor may a State require the importation of another State's products. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 339 (1989) ("States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market."). Similarly, a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local

demands or because they are needed by the people of the State." *Foster-Fountain Packing Co. v. Hayed*, 278 U.S. 1, 10 (1928). *See also H. P. Hood & Son v. Du Mond*, 336 U.S. 525, 545 (1949) (invalidating attempt by New York State to inhibit exportation of milk).

In order to give substance to this constitutional limitation on the power of the States, this Court has established a two-tiered framework for evaluating challenges under the Dormant Commerce Clause. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). First, where the statute discriminates against interstate commerce "*either* on its face, or in practical effect," *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (emphasis added), this Court applies heightened scrutiny – a rule of virtual *per se* invalidity.[14] *Philadelphia*, 437 U.S. at 624. *See also Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 100 n.4 (1994). To prevail in these circumstances, the State must

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[14] In addition, the Fourth Circuit has insisted that the virtual *per se* rule of invalidity also applies when the state law discriminates against interstate commerce in its purpose. *See Environmental Tech. Council v. Sierra Club*, 98 F.3d 774, 785 (4th Cir. 1996). However, nothing in this Court's decisions supports a separate inquiry into the legislative purpose of an act. To the contrary, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998). *See also Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) ("In expounding this law, the judgment of the court cannot, in any degree, be influenced by ... the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used ... ").

In any event, since neither the district court nor the court of appeals determined that the statute at issue had a discriminatory purpose, the issue of whether legislative purpose should be considered in determining whether to apply the rule of virtual *per se* invalidity is not at issue in these proceedings.

"demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Taylor*, 477 U.S. at 138. Second, where the statute does not discriminate against interstate commerce on its face or in its practical effect, then this Court applies a far more deferential standard – the *Pike* test. *See Carbone*, 511 U.S. at 404-05 (O'Connor, J., concurring) (Facially neutral statutes are not subject to heightened scrutiny, but statutes are invalid under *Pike* scrutiny because the burden on interstate commerce outweighs local benefits.); *Id.* at 411 (Souter, J., joined by Rehnquist, C.J., and Blackmun, J., dissenting) (suggesting that facially neutral laws should always receive deferential review). *See also Philadelphia*, 437 U.S. at 626-27 (striking down New Jersey law imposing ban on out-of-state waste, but suggesting that State "may pursue [financial and landfill conservation] ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected.") (emphasis in original). Under the *Pike* test, the statute will be upheld unless "the burden imposed on interstate commerce clearly exceeds the local benefits." *Brown-Foreman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike*, 397 U.S. at 142). Stated differently, a statute that discriminates against interstate commerce – whether on its face or in its practical effect -- is almost inevitably invalidated, but a statute that is neutral toward interstate commerce is subjected to a judicial balancing test.

A. The Question of Whether the *Pike* Balancing Test Should Be Abandoned Is Important.

The question of whether the *Pike* balancing test should be abandoned is important. As *Lingle* demonstrates, this Court should not maintain a doctrinal test

that is fundamentally flawed. There are two reasons why the *Pike* balancing test is fundamentally flawed.

First, the *Pike* balancing test is inconsistent with "deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions . . . . " *Lingle,* 125 S. Ct. at 2085. Indeed, States have the sovereign power to "try novel social and economic experiments without risk to the rest of the country."[15] *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The *Pike* test, like the "substantially advances" test rejected in *Lingle,* undermines that sovereign power to experiment by requiring "courts to scrutinize the efficacy of a vast array of state . . . regulations – a task for which courts are not well suited. Moreover, it would empower – and might often require – courts to substitute their predictive judgments for those of elected legislatures and expert agencies." *Lingle,* 125 S. Ct. at 2085. *See also Bendix Autolite Corp.,* 486 U.S. at 898 (Scalia, J., concurring) ("Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress and 'ill suited to the judicial function.' "). If the States' experiments in economic regulation are neutral toward interstate commerce, then those statutes should not be subject to second-guessing by the federal judiciary. *See Ferguson v. Skrupa,* 372 U.S. 726, 730-32 (1963).

Second, the *Pike* balancing test is simply unworkable – it is entirely subjective and produces inconsistent

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[15] Of course, the States' sovereign power to experiment is constrained by the limitations imposed by the Constitution. Thus, if the experiment discriminates against interstate commerce or violates a specific constitutional provision it is invalid. Yet, when the States attempt experiments that do not discriminate against interstate commerce and are fully consistent with other provisions of the Constitution, the federal courts should not second-guess those judgments.

results. Like some other Dormant Commerce Clause tests, it "ultimately asks courts to make policy judgments – essentially, whether non-discriminatory state regulations of various sorts are 'worth' their effects upon interstate or foreign commerce." *Intel Containers Int'l Corp.*, 507 U.S. at 78-79 (Scalia, J., concurring). Although phrased in terms of balancing, "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp.* 486 U.S. at 898 (Scalia, J., concurring). In other words, the weight does not fit the measure. The outcome under the *Pike* balancing test depends entirely upon the whim of the jurists applying the test. Those who must advise legislators and policy makers on the constitutionality of proposed measures have no guideposts. As this matter demonstrates, the benefits may exceed the burdens for the district court, but not for the court of appeals. A test that depends entirely upon subjective views rather than an objective neutral principle has no place in our constitutional law.

In sum, because the *Pike* test is inconsistent with the principles of deference to democratically elected legislators and because it is simply unworkable, this Court should consider abandoning *Pike*. In its stead, this Court should consider adopting the rule – suggested by Justice Scalia on numerous occasions – that statutes, which are neutral toward interstate commerce and which are unlike those measures previously invalidated by this Court, should not be subject to the *Pike* balancing test or any other form of Dormant Commerce Clause review.[16] *American Trucking*

[16] Based on his previous opinions, Justice Thomas would go further. In his view, the Dormant Commerce Clause has "no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application," *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 610-11

(Continued on following page)

Ass'n, 125 S. Ct. at 2426 (Scalia, J., concurring); *West Lynn Creamery, Inc.*, 512 U.S. at 210 (Scalia, J., joined by Thomas, J., concurring); *Intel Containers Int'l Corp.*, 507 U.S. at 78-79 (Scalia, J., concurring); *Bendix Autolite Corp.* 486 U.S. at 897-98 (Scalia, J., concurring). Adoption of such an approach would have two advantages. First, by limiting review to those statutes that actually discriminate against interstate commerce, the suggested rule would focus on the purposes of the Dormant Commerce Clause – prohibiting the States from discriminating – rather than second-guessing the States' policy choices.[17] Second, by insisting that the virtually *per se* invalidity standard is applicable to statutes that are indistinguishable from those previously struck down, the suggested rule would preserve the principles of *stare decisis*. *West Lynn Creamery, Inc.*, 512 U.S. at 209-10 (1994) (Scalia, J., joined by Thomas, J., concurring).

B. This Petition Provides an Excellent Vehicle for Considering Whether To Abandon the *Pike* Balancing Test.

This Petition provides an excellent vehicle for considering whether to abandon the *Pike* balancing test. If this Court is going to consider the question, it should do so in a

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(Thomas, J., dissenting), and, consequently, cannot serve as a basis for striking down a state statute." *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas, J., concurring in part and dissenting in part). While this Court may one day embrace Justice Thomas' view, it need not do so in this case. Merely abandoning the *Pike* balancing test will improve the Dormant Commerce Clause jurisprudence significantly.

[17] Of course, to the extent that such statutes implicate the Equal Protection Clause, or the provisions of the Bill of Rights that are applicable to the States, this Court should conduct the appropriate level of review.

matter where the vague and amorphous nature of the *Pike* balancing test is clear. This Petition meets the criteria for two reasons.

First, unless the *Pike* balancing test is employed, there is no reason to doubt the constitutionality of the statute at issue – the Second Paragraph of *Virginia Code* § 46.2-1993.67(5). As both the district court and the court of appeals concluded, the Second Paragraph does not discriminate against interstate commerce on its face or in its practical effect. *See App.* at 14 (court of appeals); at 62 (district court). Put another way, it is neutral – the Second Paragraph neither favors Virginia interests nor hinders out-of-state interests. There is no reason to apply the virtually *per se* rule of invalidity or any other Dormant Commerce Clause test. Furthermore, it is fundamentally different from the statutes previously invalidated by this Court on Dormant Commerce Clause grounds. Indeed, this Court upheld a similar statute, albeit on Due Process grounds. *See New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 107-08 (1978). Moreover, the Fourth Circuit rejected a Dormant Commerce Clause challenge to a similar Virginia statute regulating protests by automobile dealers. *See American Motors Sales Corp. v. Division of Motor Vehicles,* 592 F.2d 219, 222-24 (4th Cir. 1979). Because there is no other reason to question the validity of the Second Paragraph, the focus of the constitutional inquiry is necessarily on the *Pike* balancing test.

Second, the lower court proceedings illustrate the vague and amorphous nature of the *Pike* balancing test. Ignoring this Court's teaching that a disproportionate impact on out-of-state entities has no constitutional significance, *see Exxon Corp.*, 437 U.S. at 126, the court of appeals focused on the fact that there are no motorcycle manufacturers in Virginia. *App.* at 22. Presumably, Wisconsin – the home of Harley-Davidson – could enact an identical statute without raising such a concern. If the

Dormant Commerce Clause ensures a uniform national free market, then surely all States have the same ability to enact economic regulations. A State cannot have greater discretion simply because of "local" conditions. Similarly, the Fourth Circuit chose to second-guess the legislative determination that any existing dealer should be allowed to file a protest as to the establishment of a new dealership anywhere in Virginia. It stressed that any motorcycle dealer could protest "a proposed dealership some 500 miles away at the other end of the state." *App.* at 24. Yet, the lower court also suggested that "some rational geographic limit," such as forty miles, would be constitutionally acceptable. *App.* at 23-24. However, the ability of a State to enact a particular economic regulation cannot depend upon the activities of its corporate residents. Nor is the State's power dependent upon guessing the distance that is acceptable to a judicial panel, or guessing that any distance must actually be included. Limitations on the States' ability to legislate should come from established constitutional principles, not from judicial disagreements about the means utilized to achieve a particular end.

Certiorari should be granted to consider whether the *Pike* balancing test should be abandoned.

II. REVIEW SHOULD BE GRANTED TO DETERMINE IF A FEDERAL COURT MAY ENTERTAIN A FACIAL CHALLENGE USING THE *PIKE* BALANCING TEST.

Review should be granted to determine if a federal court may entertain a facial challenge using the *Pike* balancing test. Stated differently, if this Court is going to continue to use the *Pike* balancing test, then this Court should determine whether the test may be used in a facial challenge or simply limited to as-applied challenges. This

is an important federal question that has not been, but ought to be, addressed by this Court.

Facial challenges – where a litigant asks the court to determine if the law may ever be applied constitutionally – are the exception, rather than norm. *See United States v. Raines*, 362 U.S. 17, 20-22 (1960). "Not only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand." *Sabri*, 541 U.S. at 609. Moreover, they have momentous consequences. "When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, and not just in its particular application to the party in suit." *City of Chicago v. Morales*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting) (emphasis original). Consequently, this Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." *Sabri*, 541 U.S. at 609-10 (parenthetical original). A careful examination of the settings listed in *Sabri* reveals that all of the claims at issue involve heightened scrutiny and/or questions regarding the Sovereign's power to legislate on a particular subject matter.

A. The Question of Whether a Federal Court May Entertain a Facial Challenge Using the *Pike* Balancing Test Is Important.

The question of whether a federal court may entertain a facial challenge using the *Pike* balancing test is important. If this Court is going to limit facial challenges to a

few narrow circumstances, *Sabri*, 541 U.S. at 608-10, then it must make certain that all facial challenges have similar characteristics. Put another way, before a federal court can entertain a facial challenge, the claims must involve heightened scrutiny and/or questions regarding the Sovereign's power to legislate.

Although *Sabri* did not mention Dormant Commerce Clause claims as being conducive to facial challenges, *see Id.* at 608-10, there are Dormant Commerce Clause claims where a facial challenge is appropriate. Specifically, if a statute discriminates against interstate commerce – either on its face or in its practical effect – then a facial challenge should be allowed. Statutes that discriminate against interstate commerce are subject to the virtually *per se* rule of invalidity – a form of heightened scrutiny. Moreover, any state statute that discriminates against interstate commerce raises serious questions about the State's sovereign power to enact such a statute. *See Dennis v. Higgins,* 498 U.S. 439, 446 (1991) (The Dormant Commerce Clause "limits the power of the States to erect barriers against interstate trade."). The Commerce Clause empowers the National Government, not the States, to regulate interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3. When the States enact legislation that discriminates against interstate commerce, they appear to invade the National Government's sphere of sovereignty. Thus, allowing facial challenges for statutes that discriminate against interstate commerce is appropriate.

However, a facial challenge involving the *Pike* balancing test – a challenge to a statute that is neutral toward interstate commerce – is an entirely different matter. Neutral statutes do not receive heightened scrutiny; they undergo a more deferential examination. Moreover, a neutral

statute does not raise serious questions about the State's sovereign power to legislate. Indeed, the Tenth Amendment confirms that the States have the sovereign power to enact economic legislation that is neutral toward interstate commerce. Thus, a facial challenge using the *Pike* balancing test seems inappropriate. Indeed, in *Pike*, the test was an as-applied, rather than a facial challenge. *See Pike*, 397 U.S. at 143-44.

Nevertheless, while never explicitly addressing the question of whether a facial challenge is possible, this Court has utilized the *Pike* balancing test to invalidate statutes on their face. *See Edgar*, 457 U.S. at 643-44; *Raymond Motor Transp., Inc.*, 434 U.S. at 444-48. Consequently, the lower federal courts applying the *Pike* balancing test believe that it is appropriate to consider all conceivable applications of a law rather than just the applications involving the litigants. Thus, statutes that are constitutional in some aspects, but unconstitutional in others, are more likely to be invalidated in all aspects.

These proceedings illustrate the point. Jim's Motorcycle protested Yamaha's decision to establish a new dealership a mere twenty-six miles from its Bristol, Virginia location. Yet, the court of appeals did not address whether it was constitutional to allow a motorcycle dealer to challenge the establishment of a dealership a mere twenty-six miles away. Rather, the lower court focused on whether it was constitutional for a hypothetical dealer to challenge the hypothetical establishment of a new dealership several hundred miles away. Because the lower court found this hypothetical to be "overreaching in the extreme," *App.* at 24, it invalidated the Second Paragraph in all of its applications. In contrast, had the Fourth Circuit confined itself to the facts surrounding Jim's Motorcycle's

protest of Yamaha's decision to put a new dealership within Jim's Motorcycle's traditional market area, it may well have upheld the Second Paragraph. Indeed, the lower court implied that challenges within a forty-mile radius might be constitutionally acceptable. *App.* at 23-24. Yet, because the court of appeals speculated about what would happen in an unlikely situation, Virginia's Second Paragraph was invalidated in all situations for all time.

B. This Petition Provides an Excellent Vehicle for Resolving Whether a Federal Court May Entertain a Facial Challenge Using the *Pike* Balancing Test.

This Petition provides an excellent vehicle for resolving whether a federal court may entertain a facial challenge using the *Pike* balancing test. Quite simply, this Petition illustrates the differences between a facial challenge involving speculation about hypothetical facts and an as-applied challenge involving concrete facts. As explained above, in applying the *Pike* balancing test, the court of appeals focused on hypothetical situations, not on the facts of the dispute. Had the lower court applied only the facts, it may well have concluded that the statute was constitutional as applied to the litigants.

Certiorari should be granted to determine if a federal court may entertain a facial challenge using the *Pike* balancing test.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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July 15, 2005

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

YAMAHA MOTOR CORPORATION, U.S.A.,
Plaintiff-Appellant,

v.

JIM'S MOTORCYCLE, INCORPORATED, d/b/a Atlas Honda/Yamaha; DEMERST B. SMIT, in his official capacity as the Commissioner of the Department of Motor Vehicles,
Defendants-Appellees.

HARLEY-DAVIDSON MOTOR COMPANY,
Amicus Supporting Appellant.

No. 03-2070

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Robert E. Payne, District Judge.
(CA-01-471)

Argued: May 4, 2004

Decided: March 18, 2005

Before LUTTIG and MICHAEL, Circuit Judges, and Bobby R. BALDOCK, Senior Circuit Judge of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

Reversed and remanded by published opinion. Judge Michael wrote the opinion, in which Judge Luttig and Senior Judge Baldock joined.

COUNSEL

ARGUED: David Paul Murray, WILLKIE, FARR & GALLAGHER, Washington, D.C., for Appellant. Maureen Riley Matsen, Deputy State Solicitor, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellees. **ON BRIEF:** Robert M. Tyler, MCGUIREWOODS, L.L.P., Richmond, Virginia, for Appellant. Jerry W. Kilgore, Attorney General of Virginia, William H. Hurd, State Solicitor, William E. Thro, Deputy State Solicitor, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee Smit; Walter A. Marston, REED SMITH, L.L.P., Richmond, Virginia; George E. Kostel, REED SMITH, L.L.P., Falls Church, Virginia; James J. Briody, SUTHERLAND ASBILL & BRENNAN, L.L.P., Washington, D.C., for Amicus Curiae.

OPINION

MICHAEL, Circuit Judge:

This case involves a dormant Commerce Clause challenge to a unique provision in Virginia's motorcycle dealer franchise law. The provision allows any existing franchised dealer in Virginia to protest the establishment of a new dealership for the same brand anywhere in the Commonwealth. The district court rejected the challenge, concluding that the statute neither discriminates against, nor imposes a cognizable burden upon, interstate commerce. We conclude, however, that the statute's provision for statewide protest rights unduly burdens interstate

commerce in violation of the dormant Commerce Clause. The judgment is therefore reversed.

I.

A.

Virginia provides economic protection for its existing motorcycle dealers by restricting the ability of manufacturers (or distributors) to open new dealerships. The dealers have enjoyed this economic protection for many years under the First Paragraph of Virginia Code § 46.2-1993.67(5), or its predecessor, which gives an existing motorcycle dealer the right to protest the establishment of a new dealership for the same line-make (brand) in its "relevant market area," defined as a seven to ten-, fifteen-, or twenty-mile radius around the existing dealer, depending on population density. Va. Code Ann. § 46.2-1993. When a protest is filed under the First Paragraph, the proposed dealership may open only if there is reasonable evidence that the market can support all of the dealers in the line-make in the relevant market area. *Id.* § 46.2-1993.67(5). The First Paragraph closely tracks the language of Virginia's motor vehicle franchise statute that we upheld against a dormant Commerce Clause challenge in *American Motors Sales Corp. v. Division of Motor Vehicles*, 592 F.2d 219 (4th Cir. 1979).

This case, however, involves a challenge to the Second Paragraph of Virginia Code § 46.2-1993.67(5), which was enacted in 1997. The Second Paragraph provides that:

> No new or additional motorcycle dealer franchise shall be established in any county, city or town unless the manufacturer [or] distributor . . . gives advance notice to any existing franchised

> dealers of the same line-make. The notice shall be in writing and sent . . . at least forty-five days prior to the establishment of the new or additional franchise. *Any existing franchise dealer* may file a protest within thirty days of the date the notice is received. The burden of proof in establishing inadequate representation of such line-make motorcycles shall be on the manufacturer [or] distributor. . . .

Id. (emphasis added).

The Second Paragraph differs from the First by expanding the scope of existing dealers' protest rights beyond a relevant market area. No statement of purpose accompanies the Second Paragraph, and the Virginia General Assembly does not keep legislative history. There is no doubt, however, that the provision aims to expand protection for motorcycle dealerships. *See Yamaha Motor Corp. v. Quillian,* 571 S.E.2d 122, 125 (Va. 2002). The Commonwealth suggests that the added protection was needed because, in contrast to automobile dealerships, which make roughly ninety-five percent of their sales within a twenty-mile radius, motorcycle dealerships, which are fewer in number, typically sell within a forty-mile radius. Moreover, the Second Paragraph was enacted at a time of record motorcycle sales nationwide. Many dealerships were complaining to manufacturers that they were not sufficiently supplied with the top-selling models, and there is some evidence that the Second Paragraph also aims to avert any reduction in product allocation for existing motorcycle dealerships.

B.

In October 2000 Yamaha, a motorcycle distributor, sought to authorize a new dealership in Rosedale, Virginia, roughly twenty-six miles from Jim's Motorcycle, Inc., d/b/a Atlas Honda/Yamaha (Atlas), a franchised Yamaha dealer in Bristol, Virginia. Yamaha's nationwide sales had increased in each of the preceding three years, prompting it to seek additional dealers. The proposed dealership in Rosedale, Mountain Suzuki, was six miles outside Atlas's relevant market area as defined by the First Paragraph. Because the First Paragraph offered it no protection, Atlas filed a Second Paragraph protest with the Commissioner of the Virginia Department of Motor Vehicles (DMV), the state official responsible for administering the statute. The Commissioner used the Atlas protest to issue a decision, dated August 6, 2001, interpreting the Second Paragraph and establishing procedures for resolving protests filed under that provision. The Commissioner first ruled that when an existing dealer files a protest, a formal evidentiary hearing will be held if the dealer makes a preliminary showing in an informal fact-finding proceeding that it represents "in a not insignificant or insubstantial way" the line-make of motorcycle in the county, city, or town where the new dealer would be located. J.A. 41-46; Va. Code Ann. § 46.2-1993.67(5). The Commissioner did not define "in a not insignificant or insubstantial way" in terms of a fixed number of sales or percentage of market share, but referred to it as not "de minimus [sic] or incidental or accidental." J.A. 47. In determining whether the manufacturer has met its ultimate burden of proving inadequate representation of its line-make, the Commissioner would focus only on the market in the county, city, or town in which the proposed new dealership would be located. The Commissioner also did not define "inadequate

representation," but he said that "part of the concept" was "market penetration," that is, the extent to which a product is recognized and bought by customers in a particular market. J.A. 49. Finally, the Commissioner took the Second Paragraph literally and accepted that the statement "[a]ny existing franchise dealer may file a protest" means that any existing Virginia motorcycle dealer may protest the establishment of a new dealership in the same line-make anywhere in the Commonwealth.

As for the Atlas protest itself, the Commissioner ruled that Atlas was entitled to a formal evidentiary hearing. Atlas had sold fourteen Yamaha motorcycles in the four years from 1997 through 2000. Ten of the fourteen sales occurred in a single year; Atlas sold either one or two Yamaha motorcycles in each of the remaining three years. Though the irregularity of these sales might suggest they were incidental, the fourteen sales over four years represented fifty-eight percent of all Yamaha brand sales in Russell County, Virginia. Accordingly, the Commissioner concluded that Atlas represented a "not insubstantial" number of Yamaha bike sales in the Russell County market. J.A. 46-47.

In May 2002 Harley-Davidson Motor Company, Inc., amicus curiae in this case, notified Virginia dealers of its intent to authorize a new dealership in Prince George County, Virginia. H.D. Motorcycles Sales & Service, Inc. (HDM), a Richmond Harley-Davidson dealer, filed a protest under both the First and Second Paragraphs. The new dealership was outside HDM's relevant market area, a circumstance that disposed of the First Paragraph protest. In informal fact-finding proceedings before the Commissioner, evidence was offered that HDM's share of the motorcycle market in Prince George County was 14.9

to 16.7 percent for the years 1999 through 2001. This led the Commissioner to determine that HDM represented the Harley-Davidson line-make in the county in a not insubstantial way. The Commissioner thus concluded that HDM was entitled to a formal evidentiary hearing on the issue of inadequate representation.

C.

In the meantime, on July 25, 2001, Yamaha sued the Commissioner and Atlas in federal court seeking a declaration that the Second Paragraph violates the dormant Commerce Clause of the Constitution and an injunction prohibiting the paragraph's enforcement. The parties stipulated to certain facts, and the district court conducted a one-day bench trial in April 2002. In considering the case, the district court recognized that no Virginia court had interpreted the Second Paragraph. Accordingly, before issuing a decision, the district court certified four questions to the Supreme Court of Virginia that dealt with the scope of an existing dealer's protest rights.

The Supreme Court of Virginia confirmed in large part the Commissioner's interpretation of the Second Paragraph. *Quillian,* 571 S.E.2d 122. The court made clear that the Second Paragraph grants "any existing franchised dealer" in Virginia the right to protest whenever a manufacturer seeks to authorize a new dealership *anywhere in the Commonwealth* that would sell the same line-make as the existing dealer. *Id.* at 127. The Virginia court further explained that once a protest moves to a formal evidentiary hearing, the manufacturer must prove "inadequate representation . . . in the market area likely to be served by the new dealer." *Id.* at 126-28 (emphasis omitted).

Thus, the state court rejected the Commissioner's interpretation that proof of inadequate representation should be limited to the same county, city, or town in which the proposed dealer would be located. *Id.* The Commissioner adjusted his standards accordingly.

After the Supreme Court of Virginia issued its decision, Yamaha's dormant Commerce Clause challenge resumed in the district court. The parties conducted further discovery, and thereafter the court held two additional days of trial. On July 31, 2003, the court issued a commendably thorough decision that included extensive findings of fact and conclusions of law. The court first determined that the Second Paragraph did not discriminate against interstate commerce. The district court then found that the Second Paragraph imposed severe burdens on interstate commerce, although it ultimately concluded that these burdens were not cognizable under the dormant Commerce Clause. We will recount a few of the findings here, reserving others for later.

The district court found that "even a frivolous protest to which the Commissioner responds with uncharacteristic dispatch *could take years to resolve*" because a protesting dealer who is denied a hearing may appeal to a Virginia circuit court and then to the Virginia Court of Appeals. *Yamaha Motor Corp. v. Smit*, 276 F. Supp. 2d 490, 501 (E.D. Va. 2003) (emphasis added). And because the Commissioner himself has frequently failed to abide by the statutory timetable for resolving First Paragraph protests, his "promise to resolve Second Paragraph protests in a timely manner rings rather hollow." *Id.* The district court also found that in addition to being lengthy, the protest process is unpredictable: the standards for granting a protest are "highly subjective" and "remarkably vague"

because the Commissioner has resisted defining what "not insubstantial representation" means. *Id.* (internal quotation marks omitted). Instead, the Commissioner has opted to grant a hearing whenever an existing dealer produces *some* evidence of nonincidental representation. *Id.* As a result, the district court found that

> a manufacturer cannot predict with any certainty whether any of the potential protests . . . will actually advance to the formal evidentiary hearing phase, and must assume that, given the lack of a clearly defined standard and the Commissioner's bias in favor of granting the hearing, that it will be subjected to the full administrative process, the result of which can be contested in subsequent judicial proceedings.

Id. (internal citation omitted). The court also found that protests were "virtually certain" to occur in response to any proposal for a new dealership. *Id.* at 502. Expert economists testified that, given the tight supply of top-selling motorcycles, "an existing dealer has the economic incentive to file a protest of questionable merit in order to gain bargaining leverage" with manufacturers. *Id.* In addition, the district court described a ripple effect from the Second Paragraph that will thwart the establishment of new dealerships in Virginia. It is likely, the court found, that prospective dealers will not be able to secure the financing to acquire new franchise locations because manufacturers will be reluctant to provide the necessary commitment letters when protests are virtually certain. *Id.* Finally, the court recognized that the economic realities produced by the Second Paragraph had led Yamaha and Harley-Davidson "to forego establishing new dealers in Virginia." *Id.* This has caused "a relative reduction in intrabrand and interbrand competition." *Id.* at 503. As the

court noted, this should "[a]s a matter of economic theory . . . lead to higher prices for consumers," but there is no evidence yet of such an effect. *Id.*

Despite its finding that the "Second Paragraph, and the procedures that the Commissioner has adopted to enforce it, create a significant hurdle for manufacturers and their prospective new dealers," *id.* at 500, the district court determined that the burdens imposed by the Second Paragraph do not violate the dormant Commerce Clause because the statute does not "regulate[] in an area where there is a 'compelling need' for national uniformity," *id.* at 514. The court therefore granted judgment for the defendants, and Yamaha appeals. We review the district court's factual findings for clear error and its legal interpretation of the Commerce Clause de novo. *Williams v. Sandman*, 187 F.3d 379, 381 (4th Cir. 1999).

II.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although the Clause speaks only of congressional power, the Supreme Court since 1852 "has construed the Commerce Clause as incorporating an implicit restraint on state power even in the absence of congressional action – hence the notion of a 'dormant' Commerce Clause." 1 Laurence H. Tribe, American Constitutional Law § 6-2, at 1030 (3d ed. 2000) (citing *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1851)). The dormant Commerce Clause thus "limits the power of the States to erect barriers against interstate trade." *Dennis v. Higgins*, 498 U.S. 439, 446 (1991) (internal quotation marks omitted).

Analysis of a dormant Commerce Clause challenge to a state statute proceeds on two tiers, a discrimination tier and an undue burden tier. *See Envtl. Tech. Council v. Sierra Club,* 98 F.3d 774, 785 (4th Cir. 1996). Under the discrimination tier, "[w]hen a state statute clearly discriminates against interstate commerce, it will be struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. Indeed, when the state statute amounts to simple economic protectionism, a virtually *per se* rule of invalidity has applied." *Wyoming v. Oklahoma,* 502 U.S. 437, 454-55 (1992) (internal quotation marks and citations omitted). Under the undue burden (or *Pike* balancing) tier, "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). A "less strict scrutiny" applies under the undue burden tier. *Wyoming,* 502 U.S. at 455 n.12. As the Supreme Court has recognized, "there is no clear line separating close cases on which scrutiny [or tier of analysis] should apply." *Id.* (internal quotation marks omitted). Here, the district court rejected Yamaha's dormant Commerce Clause challenge after applying both tiers of analysis. The Court held that the Second Paragraph of Virginia Code § 46.2-1993.67(5) neither discriminates against nor imposes any cognizable burdens on interstate commerce. Yamaha argues that the court erred in each of these determinations.

A.

A "state law [that] discriminates [against interstate commerce] facially, in its practical effect, or in its purpose," *Envtl. Tech. Council,* 98 F.3d at 785, will be struck down unless the state demonstrates "both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means," *Maine v. Taylor,* 477 U.S. 131, 138 (1986) (internal quotation marks omitted). The district court found that the Second Paragraph does not discriminate against interstate commerce, and thus took the discrimination-tier analysis no further.

The district court concluded, and Yamaha does not dispute, that the language of the Second Paragraph is neutral on its face. The provision regulates motorcycle manufacturers, and it makes no distinction between in-state and out-of-state manufacturers. There are no motorcycle manufacturers in Virginia, but if there were, the statute would "visit[] its effects equally upon both interstate and local business." *Lewis v. BT Inv. Managers, Inc.,* 447 U.S. 27, 36 (1980). Further, as we discuss in greater detail in our *Pike* analysis, *see infra* part II.B, the Second Paragraph has a legitimate general purpose: to protect existing motorcycle dealers in Virginia from unfair practices by manufacturers (regardless of their location) in the establishment of new dealerships. We therefore turn to the district court's determination that the Second Paragraph does not discriminate in its practical effect.

In addressing the issue of discriminatory effect, the district court properly focused on the "probable effect[]," *Lewis,* 447 U.S. at 37, or the "discernable practical effect that [the] challenged statutory provision has or would

have upon interstate commerce," *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 335 (4th Cir. 2001). Yamaha argues that the Second Paragraph discriminates in effect by conferring a benefit on existing motorcycle dealers in Virginia at the expense of existing dealers in other states. Yamaha and other motorcycle manufacturers distribute their bikes to dealers based on a national allocation system, under which dealers receive bike allotments based on their prior sales and on national availability. As the district court found, the demand for motorcycles has long exceeded supply, and dealers are constantly in need of top-selling models. Virginia dealers therefore have an incentive to file Second Paragraph protests as a means of gaining leverage to negotiate with manufacturers for more favorable product allocations. Any product allocation concessions would come at the expense of other dealers, Yamaha argues. And because Virginia has an equitable allocation law, *see* Va. Code Ann. § 46.2-1993.67(9), any concessions would come at the expense of dealers in other states. Thus, the Second Paragraph has a discriminatory effect, Yamaha claims, by giving added bargaining power to Virginia dealers, which they might leverage to extract more favorable product allocations to the detriment of out-of-state dealers. The district court held that Yamaha's theory was too speculative to provide a basis for finding the Second Paragraph discriminatory in its effect. *Yamaha*, 276 F. Supp. 2d at 508.

As the district court's discussion reveals, Yamaha did not produce any evidence indicating that the Second Paragraph's probable effect would be that a manufacturer would yield to a protesting dealer's effort to extract additional motorcycles or some other advantage in exchange for dropping a protest. The court pointed to the one (failed)

attempt by a Virginia dealer to use a protest to gain additional product. HDM filed a Second Paragraph protest to Harley-Davidson's proposed establishment of a new dealership; thereafter HDM offered to drop its protest in exchange for a sixty percent increase in bike allocation and the conversion of a secondary retail location into a full dealership. In rebuffing HDM, Harley-Davidson indicated that it would never give in to such demands. Thus, the district court found that "the manufacturers have not acceded to extortionate allocation demands and have no intent to do so." *Id.* This finding is supported by the record, and the district court was correct in concluding that Yamaha did not produce any evidence that the Second Paragraph would have any probable or discernible discriminatory effects on interstate commerce. Accordingly, we will not disturb the district court's conclusion that the Second Paragraph does not discriminate against interstate commerce.

B.

Yamaha next argues that the district court erred when it determined that the Second Paragraph "survives the *Pike* inquiry" because it "creates no cognizable burdens on interstate commerce." *Id.* at 514. A statute that does not discriminate against interstate commerce may still be struck down under *Pike* balancing if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree." *Pike*, 397 U.S. at 142 (internal citation omitted); *see also General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (stating that the dormant Commerce Clause also prohibits regulation that "unduly burdens interstate commerce"). A statute

need not be perfectly tailored to survive *Pike* balancing, but it must be reasonably tailored: "the extent of the burden that will be tolerated . . . depend[s] on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

In determining whether a statute has "a legitimate local purpose" and "putative local benefits," a court must proceed with deference to the state legislature. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987). Courts "are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation." *Id.* (internal quotation marks omitted). Thus, we consider whether the legislature had a rational basis for believing there was a legitimate purpose that would be advanced by the statute. *See id.* at 92-93. We likewise apply a deferential standard in identifying a statute's putative benefits. *See id.*

The *Pike* test requires closer examination, however, when a court assesses a statute's burdens, especially when the burdens fall predominantly on out-of-state interests. *See id.* at 93; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981); *Telvest, Inc. v. Bradshaw*, 697 F.2d 576, 580 (4th Cir. 1983). Nevertheless, when local economic interests are affected, "[n]ondiscriminatory measures . . . are generally upheld, in spite of [some burden] on interstate commerce, in part because the existence of major in-state interests adversely affected is a powerful safeguard against legislative abuse." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (internal quotation marks and alterations in original omitted). In other words, burdened in-state interests can be relied upon to prevent or rectify legislative abuse, but the same

cannot be said of burdened out-of-state interests. Thus, when there are few or no adversely affected in-state interests, *Pike* balancing serves as a check against legislative abuse. *See Raymond Motor Transp., Inc. v. Rice,* 434 U.S. 429, 444 n.18 (1978) (upholding state highway regulations because they adversely affect "local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations").

In this case, the first part of the *Pike* analysis – determining whether the Second Paragraph serves a legitimate local purpose – is controlled by *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96 (1978), and *American Motors,* 592 F.2d 219. In *Orrin Fox* the Supreme Court upheld an automobile dealer franchise regulation challenged under the Due Process Clause and the Sherman Act, finding that it served the legitimate purpose of addressing the "disparity in bargaining power between automobile manufacturers and their dealers" by providing protections for existing dealers (often small businesses) when new dealer franchises were proposed. 439 U.S. at 100, 107. Shortly thereafter, in *American Motors* we upheld a predecessor to the First Paragraph that made it unlawful for a motor vehicle manufacturer "[t]o grant an additional franchise for a particular line-make . . . in a trade area already served by [its] dealer or dealers . . . unless the franchisor" gave written notice to its other dealers "in the trade area;" a notified dealer could then request a determination by the Commissioner as to whether the trade area would support another dealer. Va. Code Ann. § 46.1-547(d) (1978); *Am. Motors,* 592 F.2d at 221. In evaluating the statute's purpose, we followed *Orrin Fox* and determined that the Virginia General Assembly

was legitimately "'empowered to subordinate the franchise rights of . . . manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices.'" *Id.* at 222 (quoting *Orrin Fox*, 439 U.S. at 107). The purpose of the Second Paragraph is basically the same as that of the predecessor to the First Paragraph we upheld in *American Motors*. The Second Paragraph seeks to achieve that purpose by more aggressive means, but this difference affects the balancing of interests, not the legitimacy of the statute's purpose. Thus, we proceed to an assessment of the Second Paragraph's benefits and burdens under *Pike* balancing.

The district court struggled to articulate a benefit of the Second Paragraph, stating that

> the closest approximation of the benefit achieved by the statute is that some number of existing dealers, who, although located beyond the relevant market area defined by the First Paragraph, serve the geographic market area of a hypothetical prospective dealer in a not insignificant way, will be protected against the diminution in return on their investment in capacity and advertising that would occur should the hypothetical dealer actually open.

Yamaha, 276 F. Supp. 2d at 512. The Commonwealth maintains that such "objective precision in identifying benefits, beyond those presumed by the purpose of the statute . . . is not necessary." Br. for Appellees at 38-39. Accordingly, the Commonwealth offers no new argument for the benefits of the Second Paragraph. Instead, it falls back on *Orrin Fox* and *American Motors*:

> There is nothing in the record of this case sufficient to raise any doubt that the second

> paragraph serves precisely the same legitimate state interests served by the dealer protection statutes at issue in *[Orrin] Fox* and *American Motors*. Those explanations of the legitimate interest advanced by the second paragraph also describe the putative local benefits that flow from the second paragraph.

Id. at 37-38.

Only rarely have we doubted a statute's putative benefits, but we did, for example, when we concluded that the purported "'ruinous' effects of competition" that a statute aimed to combat were "entirely speculative." *Medigen, Inc. v. Pub. Serv. Comm'n*, 985 F.2d 164, 167 (4th Cir. 1993). We do not discount the benefit of preventing oversaturation of the retail motorcycle market because it is not entirely speculative that existing dealers will suffer harm from excessive competition. The First Paragraph, however, provides this same benefit, and there is a serious question whether any additional benefit from the Second Paragraph is clearly exceeded by the added burdens.

As the district court recognized, the burdens of the Second Paragraph are severe. To begin with, the Second Paragraph is uniquely anti-competitive even as dealer protection laws go. Although the First Paragraph is a typical dealer protection statute, the Second Paragraph "has no parallel in the law of any other state," *Yamaha*, 276 F. Supp. 2d at 495, and it creates a significant barrier to market entry, *see id.* at 500. Unlike the Second Paragraph, the dealer protection statutes in other states set geographic limitations on the protest rights of existing dealers; of the eleven other state statutes submitted in the record, ten limit protest rights to a market area radius of

twenty miles or less. (One state allows the market area to be defined in the dealership agreement.)

The Second Paragraph creates a barrier to market entry because of the "virtual certainty" of a protest whenever a manufacturer attempts to authorize a new dealership. *Id.* at 502. "[E]ven a frivolous protest . . . could take years to resolve," the district court found. *Id.* at 501. In any event, the Commissioner has set quite a low threshold for what an existing dealer must show to trigger a formal evidentiary hearing; the dealer must only show that it represents the relevant line-make in a "not insignificant or insubstantial" way in the county, city, or town of the prospective dealer. J.A. 43. Thus, the district court found that with "the Commissioner's bias in favor of granting [a] hearing," a manufacturer "must assume that . . . it will be subjected to the full administrative process, the result of which can be contested in subsequent judicial proceedings." *Yamaha,* 276 F. Supp. 2d at 501. Even if a formal hearing is denied, the existing dealer may pursue the matter in Virginia courts, "a process that could [go on for] years." *Id.*

In other states with dealer protection statutes, a manufacturer can reasonably anticipate the regions where it might be susceptible to a protest and can plan its expansion accordingly. In Virginia, however, a manufacturer has no way of avoiding the Second Paragraph's reach; targeting an underserved area of the Commonwealth will not spare it a protest. For example, an existing dealer in Virginia Beach could protest the establishment of a new dealership in Big Stone Gap, nearly 500 miles away. Thus, manufacturers cannot plan franchise expansion in Virginia as they can in other states; instead, they are forced to play a waiting game that could take years. The only

business plan a manufacturer could implement would be to provide the statutorily required notice of a proposed dealership and then hunker down for a long fight.

The chilling effect of protests and potential protests on new dealership openings in Virginia has been established. Manufacturers incur significant costs, measured in both money and effort, in defending against protests, and this makes an attempt to open a new dealership in Virginia more burdensome than anywhere else. Even though "demand for motorcycles continues to increase," *id.* at 503, the "economic realities" of the Second Paragraph have caused both Yamaha and Harley-Davidson "to forego [all efforts to] establish[] new dealers in Virginia." *Id.* at 502. Instead, the two manufacturers will "devote their capital and business expansion efforts in other states." *Id.* "One consequence of the decisions by Yamaha and Harley-Davidson," the district court found, "is a relative reduction in intrabrand and interbrand competition." *Id.* at 503. The Second Paragraph will also deter would-be franchisees, who will not want to experience what happened to Harley-Davidson's prospective dealer in Prince George County, Virginia. That prospective dealer invested in a site, quit his job, and moved his family to Prince George County, only to be met with a Second Paragraph protest. The district court found that "the uncertainty surrounding the protest process makes it difficult for prospective dealers" to secure a dealership location, and a definite location is a prerequisite to the Second Paragraph's notice procedure. *Id.* at 502. As the district court said, because "protest is a virtual certainty," manufacturers will be reluctant to provide commitment letters, and without commitment letters, "prospective dealers are unlikely to be able to [obtain] the financing necessary to secure a location." *Id.*

All of these circumstances led the district court to its central finding that the Second Paragraph "create[s] significant economic burdens chilling the opening of new dealerships." *Id.* at 514.

The district court held, however, that these "are not the type[s] of burdens the *Pike* test is meant to address." *Id.* The court, relying on dicta from a footnote in *Tracy*, said that *Pike* balancing applies only when a "'generally nondiscriminatory'" state law "'undermine[s] a compelling need for national uniformity in regulation.'" *Id.* (quoting *Tracy*, 519 U.S. at 299 n.12). According to the district court, because the Second Paragraph does not regulate in an area where there is a compelling need for national uniformity, the provision "creates no cognizable burdens on interstate commerce, and thus necessarily survives the *Pike* inquiry." *Id.*

We respectfully disagree with this analysis. *Pike* balancing is not limited to cases where state statutes interfere with a "compelling need for national uniformity in regulation." Cases decided under the dormant Commerce Clause sometimes invoke this principle, for example, where statutes "adversely affect interstate commerce by subjecting activities to inconsistent regulations." *CTS Corp.*, 481 U.S. at 88. However, *Pike* balancing is conducted in situations where a need for national uniformity is not implicated. *See, e.g., Clover Leaf*, 449 U.S. at 472-74 (upholding statute prohibiting retailers from selling milk in plastic containers because the "minor" burden on interstate commerce was outweighed by "substantial" local benefits); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352-54 (1977) (striking down statute requiring that all apple containers include in-state grading information in part because state could not justify it "in terms of

the local benefits"); *Pike*, 397 U.S. at 142-46 (striking down statute requiring in-state packaging of cantaloupes prior to interstate shipment because legitimate state interests were outweighed by incidental burden on allocation of company's resources). As noted, *Tracy*'s footnote twelve is dicta: the Supreme Court acknowledged in the footnote that General Motors had brought only a first-tier (discrimination) challenge under the dormant Commerce Clause, 519 U.S. at 298 n.12; the Court thus had no occasion to rule on the proper contours of a second-tier (*Pike* balancing) challenge. *Pike* balancing is therefore appropriate in cases like this one, where interstate commerce is burdened by a state law that imposes barriers to market entry.

In proceeding with the *Pike* analysis, we note that the Second Paragraph not only imposes cognizable burdens on commerce, it imposes these heavy burdens predominantly on out-of-state interests. There are no motorcycle manufacturers located in Virginia. And existing motorcycle dealers, the major in-state interests affected by the provision, stand to benefit from the law's enforcement. The existing dealers cannot "be relied upon to prevent legislative abuse" because they "ha[ve] been mollified by" the economic protection they currently enjoy. *W. Lynn Creamery*, 512 U.S. at 200. Indeed, the in-state interests actively seek to protect the burdensome law. In 2001 the Virginia Motorcycle Dealers Association asked each franchised dealer in the Commonwealth "to contribute at least $1000 to cover the legal fees for defending our 'best in the nation' franchise laws" and to cover the costs of lobbying the General Assembly. J.A. 827. Although those brave enough to try to open new dealerships are likely to be Virginia residents, these few individuals are sure to be outnumbered and out-gunned by the existing dealers. As a result,

there is little political check against the possibility of legislative abuse in the form of motorcycle franchise laws that unduly burden commerce. *See Raymond Motor,* 434 U.S. at 444 n.18.

The unnecessary and excessive breadth of the Second Paragraph persuades us that the statute's burdens clearly exceed its benefits. As for benefits, the district court could only approximate that "some number of existing dealers," who are outside the relevant market area protected by the First Paragraph but "serve the geographic market area of a hypothetical prospective dealer in a not insignificant way," might receive some protection on their investment and advertising "should the hypothetical dealer actually open." *Yamaha,* 276 F. Supp. 2d at 512. Weighed against this weak benefit is a substantial burden, a barrier to market entry, that is unparalleled in scope. The Commonwealth has erected this barrier in the absence of evidence that protection in the form of statewide protest rights for every motorcycle dealer was needed. *See Medigen,* 985 F.2d at 167 (finding "no basis" for "concluding that competition in this market has had or will have any destructive effects"). The Commonwealth's only explanation for expanding the protection afforded by the First Paragraph is that motorcycle dealerships tend to sell within a forty-mile radius, which is beyond the First Paragraph's "relevant market" protection of a radius up to twenty miles. The Second Paragraph, of course, did not limit protest rights to dealers within a forty-mile radius of a proposed dealership; it imposed no limit at all. The *Pike* inquiry requires us to consider whether the Second Paragraph's benefits could have been achieved with a less restrictive alternative. We conclude that it could have. The Second Paragraph could have imposed some rational geographic

limit on protest rights, but it did not. Under the Second Paragraph as it stands, an existing dealer at one end of Virginia can protest a proposed dealership some 500 miles away at the other end of the state. That is overreaching in the extreme. If we were to uphold the blanket statewide protection of the Second Paragraph, we would be giving Virginia the green light to extend similar protection to automobile dealers and franchisees of other product lines, thereby turning Virginia into an island of economic protectionism. If other states were to follow suit, it would jeopardize what the dormant Commerce Clause aims to preserve: "a national [free] market for competition undisturbed by preferential advantages conferred by [individual] State[s] upon [their] residents or resident competitors." *Tracy*, 519 U.S. at 299. The dormant Commerce Clause places certain limits on protective regulation, and these limits have been exceeded in the Second Paragraph.

III.

The Second Paragraph of Virginia Code § 46.2-1993.67(5) violates the dormant Commerce Clause by imposing an undue burden on interstate commerce. The judgment of the district court is therefore reversed, and the case is remanded for entry of judgment in favor of Yamaha.

REVERSED AND REMANDED

276 F.Supp.2d 490

United States District Court,
E.D. Virginia,
Richmond Division.
YAMAHA MOTOR CORP., U.S.A., Plaintiff,
v.
Demerst B. SMIT, in his Official Capacity as the Acting Commissioner of the Department of Motor Vehicles and Jim's Motorcycle, Inc., d/b/a Atlas Honda/Yamaha Defendants.
No. CIV.A. 3:01CV471.

July 31, 2003.

J. William Boland, Esquire, Thomas E. Spahn, Esquire, Robert M. Tyler, Esquire, Laura R. White, Esquire, McGuireWoods LLP, Richmond, David P. Murray, Esquire, Wilkie Farr & Gallagher, Washington, D.C., for Plaintiff.

Walter A. Marston, Jr., Esquire, George E. Kostel, Esquire, Reed Smith LLP, Richmond, for Jim's Motorcycle.

Jeffrey A. Spencer, Esquire, Office of the Attorney General, Richmond, for Demerst Smit.

Bryan M. Haynes, Esquire, Troutman Sanders LLP, Richmond, James J. Briody, Esquire, Sutherland, Asbill & Brennan, Washington, D.C., for Harley-Davidson (Movant).

MEMORANDUM OPINION

PAYNE, District Judge.

Yamaha Motor Corporation, U.S.A. ("Yamaha") is a California corporation that distributes motorcycles and related parts and accessories throughout the United States. Yamaha has approximately 1,200 authorized

motorcycle dealers nationwide, twenty-six of which are located in the Commonwealth of Virginia. Defendant, Demerst B. Smit,[1] is the Commissioner of the Virginia Department of Motor Vehicles (the "Commissioner") and is responsible for administering the Motorcycle Dealer Chapter of the Code of Virginia (Va. Code Ann. §§ 46.2-1993 *et seq.*). Defendant, Jim's Motorcycle ("Atlas"), does business as Atlas Honda/Yamaha and is an existing dealer of Yamaha and Honda motorcycles in Bristol, Virginia. Amicus Curiae Harley-Davidson Motor Company, Inc. ("Harley-Davidson") is a motorcycle manufacturer that, like Yamaha, distributes motorcycles and related parts and accessories in the Commonwealth of Virginia, and, as such, has a direct interest in the outcome of this litigation.

In 2000, Yamaha decided to authorize a new motorcycle dealership in Rosedale, Virginia, approximately 26 miles away from Atlas. In October 2000, as allowed by Code of Virginia § 46.2-1993.67(5), Atlas filed a protest with the DMV against Yamaha's establishment of the Rosedale dealer.

Yamaha sought summary disposition of the protest, and on April 19, 2001, the Hearing Officer appointed to hear the protest issued a one-page order summarily finding that Atlas was entitled to a hearing and stating that such a hearing would be held at a mutually convenient time. On May 8, 2001, after confirming that the Hearing Officer's order represented the position of the Commissioner and was not subject to interlocutory appeal,

[1] During the course of this action, Demerst B. Smit replaced Asbury W. Quillian as the Commissioner and an Order has been entered substituting the name of the new Commissioner.

Yamaha initiated a civil action in this Court challenging the validity of the second paragraph of § 46.2-1993.67(5) (the "Second Paragraph") under the dormant aspect of the Commerce Clause of the United States Constitution. *See* U.S. Const., art. I, § 8, cl. 3. Shortly thereafter, Yamaha agreed voluntarily to dismiss its federal action without prejudice upon learning from the Commissioner that the Hearing Officer did not, in fact, have authority to issue the order under protest and that the Commissioner intended to render a final decision that might narrow the reach of the statute and thereby resolve some, if not all, of the federal constitutional issues. On July 6, 2001, the Commissioner issued his final decision wherein he found that Atlas was entitled to a hearing. One month later, on August 6, 2001, the Commissioner issued an amended decision (Yamaha Ex. 2 (the "Amended Decision")) that reached the same conclusions as the earlier decision, but clarified certain matters.

Yamaha filed a second federal complaint in this action on July 25, 2001 seeking a declaration that the Second Paragraph violates the dormant Commerce Clause, an injunction prohibiting the Commissioner from enforcing the Second Paragraph, and an award of attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988.[2] Soon thereafter, the parties agreed to conduct a summary bench trial based on a stipulated factual record, and the Court conducted that bench trial on April 9, 2002.

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[2] In October 2001, over two months after initiating the present federal action, Yamaha filed a "provisional" appeal of the Amended Decision in the Circuit Court of Washington County as a means of preserving any state law claims. Before any proceedings were conducted in that court, the parties agreed to stay the appeal pending the resolution of the present federal action.

After conducting the bench trial, the Court concluded that resolution of the constitutional questions depended on the proper interpretation of the Second Paragraph, and, finding no Virginia precedent respecting the proper interpretation, submitted four certified questions to the Supreme Court of Virginia on May 17, 2002. Those questions were:

> 1. Whether the Second Paragraph grants to every existing Virginia franchised dealer of a line-make of motorcycles the right to receive forty-five days' advance notice of, and to protest, the establishment of any new or additional motorcycle dealer franchise of the same line-make in any county, city or town of Virginia, thereby placing on the manufacturer the burden of proving, in a formal evidentiary hearing, "inadequate representation" of its line-make of motorcycles throughout the Commonwealth before it may proceed to establish that dealership?
>
> 2. Whether the Commissioner was correct in interpreting the Second Paragraph in a manner such that only those protesting franchised dealers who make a preliminary showing that they actually are representing, "in a not insubstantial way," the line-make of motorcycles in the "county, city or town" where the proposed new or additional dealer would be located will qualify for a formal evidentiary hearing in which the manufacturer would bear the burden of proving "inadequate representation" of that line-make, by the protesting franchised dealer, in that "county, city or town?"
>
> 3. Whether the Second Paragraph should be interpreted to make the advance notice and protest rights granted therein applicable to only existing franchised dealers of a line-make of motorcycles which are located in the same "county, city or town" in which a

proposed new or additional motorcycle dealer franchise of the same line-make would be established, and to limit the burden on the manufacturer to proving "inadequate representation" of its line-make merely in that "county, city or town?"

4. If none of the three aforementioned interpretations of the Second Paragraph is correct, what is the correct interpretation of the statute?

On June 12, 2002, the Supreme Court of Virginia accepted the questions, and, on November 1, 2002, issued an opinion that rephrased the questions, and then answered the rephrased questions. *See Yamaha Motor Corp. v. Quillian,* 264 Va. 656, 571 S.E.2d 122 (2002). At the request of the parties, the Court allowed additional discovery to be conducted on the question of the burdens placed on interstate commerce by the Second Paragraph, and conducted evidentiary hearings on February 14, 2003 and March 1, 2003. For the reasons that follow, the Second Paragraph does not violate the dormant aspect of the Commerce Clause; and, accordingly, the relief requested is denied.

STATEMENT OF FACTS

A. Background

1. The Statute

Code of Virginia § 46.2-1993.67(5) protects Virginia's existing motorcycle dealers by regulating the ability of motorcycle distributors like Yamaha to open new dealers in the Commonwealth. This protective statute consists of two paragraphs, the "First Paragraph" and the Second Paragraph. Before 1997, the statute consisted only of the First Paragraph, a provision which was adapted almost

entirely from Code of Virginia § 46.2-1569(4),[3] the analogous provision governing motor vehicle dealers generally, which itself was derived from the former Code of Virginia § 46.2-547(d). This lineage is important only because, as discussed below, the Fourth Circuit has previously considered a dormant Commerce Clause challenge to § 46.1-547(d) and held that the automobile dealer progenitor of the First Paragraph did not violate the dormant Commerce Clause. *See American Motors Sales Corp. v. Division of Motor Vehicles,* 592 F.2d 219 (1979).

The First Paragraph places limitations on motorcycle manufacturers that intend to open new motorcycle dealerships in the "relevant market area" of an motorcycle existing dealer. The term "relevant market area" is defined in § 46.2-1993 as a circular area around the dealer with a 10, 15, or 20 mile radius, depending on the population density of the area. The First Paragraph (*i.e.*, the statute) provides, in relevant part, as follows:

> It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:
>
> . . .

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[3] Code of Virginia § 46.2-1993.67 is part of the "Motorcycle Dealers Act," which was enacted in 1996, and is codified at § 46.2-1993 through 46.2-1993.82. Prior to 1996, the establishment and operation of motorcycle dealerships was regulated under the "Motor Vehicle Dealers Act," presently §§ 1500 through of [sic] 1582 of Title 46.2 of the Code of Virginia. In enacting the Motorcycle Dealers Act, the General Assembly simply adapted the then existing provisions of the Motor Vehicle Dealers Act, transferring them almost verbatim into the new Act. Accordingly, prior to amendment in 1997, § 46.2-1993.67(5) was substantively identical to the corresponding provisions of the Motor Vehicle Dealers Act.

> 5. To grant an additional franchise for a particular line-make of motorcycle in a relevant market area in which a dealer or dealers in that line-make are already located unless the franchisor has first advised in writing all other dealers in the line-make in the relevant market area. No such additional franchise may be established at the proposed site unless the Commissioner has determined, if requested by a dealer of the same line-make in the relevant market area within thirty days after receipt of the franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will support all of the dealers in that line-make in the relevant market area.
>
> . . .

Thus, under the First Paragraph, an existing motorcycle dealer may protest the establishment of the putative new dealership if it is located in the existing dealer's relevant market area.

The First Paragraph is generally consistent with the dealer establishment laws of the other states. *See generally New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 100-02, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978) (describing the movement that led to the establishment of such laws and collecting statutes from various states). As noted above, in *American Motors,* the Fourth Circuit held that the predecessor of the First Paragraph, § 46.1-547(d), was a valid exercise of state power that did not offend the dormant Commerce Clause. 592 F.2d at 222-24. This action does not involve the First Paragraph.

In 1997, the Virginia General Assembly added the Second Paragraph to § 46.2-1993.67(5) and, in so doing,

significantly broadened the scope of protection afforded to Virginia's existing motorcycle dealers. The Second Paragraph achieved that result by granting protest rights to all existing dealers of the manufacturer's line-make whenever a manufacturer seeks to open a dealership anywhere in the Commonwealth, even where the location of the proposed new dealership is outside the relevant market area of the protesting dealer. The Second Paragraph provides that:

> No new or additional motorcycle dealer franchise shall be established in any county, city or town unless the manufacturer [or] distributor . . . gives advance notice to *any existing franchised dealers of the same line-make.* The notice shall be in writing and sent by certified mail, return receipt requested, at least forty-five days prior to the establishment of the new or additional franchise. *Any existing franchise dealer may file a protest within thirty days of the date the notice is received.* The burden of proof in establishing inadequate representation of such line-make motorcycles shall be on the manufacturer [or] distributor[.]

(emphasis added.) In answering this Court's certified questions, the Supreme Court of Virginia clarified the scope and effect of the Second Paragraph. *See Yamaha,* 571 S.E.2d at 126-28. First, the Supreme Court construed the term, "any existing franchise dealer" used in the first sentence of the paragraph to mean "any existing dealer of the same line-make of motorcycles in the Commonwealth of Virginia." *Id.* at 127. Second, the Supreme Court held that the geographic area wherein the manufacturer must prove inadequate representation is the geographic market area likely to be served by the new dealer. *Id.* at 126, 127. Therefore, under the statute itself, as interpreted by the Supreme Court of Virginia, any existing dealer in a

particular line-make can protest the proposed opening of a new dealership in that line-make anywhere in the Commonwealth, whether or not the new dealership is within the "relevant market area" of the protesting dealer. And, in order to survive the protest, the manufacturer must show inadequate representation in the market area likely to be served by the new dealer. The Second Paragraph, thusly interpreted, undeniably gives existing dealers of motorcycles significantly increased protection over and above that provided in the First Paragraph. It is undisputed that the Second Paragraph has no parallel in the law of any other state.

The General Assembly made no statement of purpose in amending the statute to add these protections. There is some evidence in the record that suggests that the amendment was promoted by the Virginia Motorcycle Dealer's Association ("VMDA"),[4] a scenario that is highly plausible given the significantly added protection that the Second Paragraph affords VMDA's members. However, because Virginia does not retain legislative history and because the General Assembly did not recite its purpose in the text of the statute, there is no direct evidence of legislative intent. Notwithstanding the lack of direct evidence of intent, the clear effect of the statute's text is to

[4] The only real evidence respecting the role of the VMDA in the passage of the Second Paragraph is the following statement of Steven Stupasky, DMV's Vehicle Services Administration Lead Analyst, in an oral report to the Franchise Law Committee of the Virginia Motor Vehicle Dealer Board: "Now I don't know how the hearing officer and courts are going to interpret [the Second Paragraph] *but what the motorcycle association intended was* . . . " (Yamaha Ex. 3 at Y01029-30.) From this statement, one arguably could infer that Stupasky, a person in a position to know, believed that the Second Paragraph was drafted either by, or at the behest of, the VMDA.

confer added protection on existing dealers by allowing protests by dealers outside the geographic limits set by the First Paragraph. And, the Second Paragraph is part of a statute that is modeled directly upon a similar statute that the Fourth Circuit has interpreted to be a dealer protective statute. Thus, both the context of the Second Paragraph and the obvious consequences of its text disclose a protective legislative intent.

Also, the record contains evidence that, although the First Paragraph's relevant market area mileage circles are the same as those that apply for automobile dealers, *see* Va. Code §§ 46.2-1500 and 46.2-1509(4), there were, in 1997, significantly fewer motorcycle dealers than there were automobile dealers. Consequently, the average motorcycle dealer's geographic market seems to have been significantly larger than that of the average automobile dealer. (*See* Yamaha Ex. 2 at 4-5.) In addition, in 1997, motorcycle sales were increasing generally and demand was outstripping supply. (Yamaha Ex. 11 at ¶ 13.) This general market climate led motorcycle dealers in Virginia and elsewhere to complain to manufacturers about receiving insufficient numbers of top-selling units. (*Id.*) These facts were available to the General Assembly at the time it passed the Second Paragraph, and, taken together, they could lead a reasonable person to conclude that protections beyond those provided by the First Paragraph were necessary.

2. The Development Of A Procedure For Resolving Second Paragraph Protests

For reasons unknown, the Commissioner did not enforce the notice requirements of the Second Paragraph

until late 1999. Then, in November 1999, at least in part at the behest of the Virginia Motorcycle Dealers Association ("VMDA"), (*see* Yamaha Ex. 1), the Commissioner sent a reminder letter to motorcycle manufacturers that reiterated the requirements of the Second Paragraph. (Joint App. Ex. 13 at Ex. C.) Since that time, the Commissioner has actively enforced the Second Paragraph. Unfortunately, however, the Commissioner did not formulate in advance any procedures for resolving Second Paragraph protests or attempt in any way to interpret the Second Paragraph. As a result, the Commissioner was compelled to craft the procedures for Second Paragraph protests on the fly while attempting to resolve the protests lodged in late 1999 after he began enforcing the notice requirement.

Accordingly, from November 1999 to February 2003, the Commissioner gradually developed procedures for resolving protests under § 46.2-1993.67(5) on a case-by-case basis. The test case for the Commissioner, in many respects, was Atlas's protest of Yamaha's planned opening of the Rosedale dealership. As discussed below, that case provided the Commissioner the opportunity to interpret the ambiguous provisions in the statute and formulate a process for resolving protests.

Atlas lodged its protest with the Commissioner in October 2000 upon learning that Yamaha intended to establish a new dealer in Rosedale, Virginia. Rosedale is in Russell County and is approximately 26 miles as the crow flies from Atlas's existing dealership in Bristol, Virginia, and outside Atlas's relevant market area as defined in the First Paragraph. Because this was the first case in which

a dealer had pressed a Second Paragraph protest,[5] the Commissioner, in the course of addressing the protest, interpreted extensively the rather inartfully-crafted Second Paragraph and developed procedures for resolving future Second Paragraph protests. Therefore, the Atlas protest is relevant not only because it gives rise to this action, but also because it offers some insight into the Commissioner's thinking in establishing the process now in place.

On November 8, 2000, the Commissioner allowed the Atlas protest to proceed and appointed a Hearing Officer. After the parties agreed that any protest by Atlas must be limited to the Second Paragraph, (Yamaha Ex. 1 at ¶ 20), Yamaha sought summary disposition of the protest based on its interpretation of the statute. Yamaha urged the Hearing Officer to interpret the Second Paragraph to limit notice and protest rights to existing dealers located in the same "county, city or town" as the proposed dealer. Yamaha also argued that the manufacturer's burden of proving "inadequate representation" of its line-make should be similarly limited to the relevant "county, city or town." (Yamaha Ex. 15.)

On August 6, 2001, the Commissioner issued the Amended Decision, wherein he both interpreted the Second Paragraph and established the procedures for resolving future Second Paragraph protests. The Commissioner

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[5] Before the Atlas protest, V-Twin Acquisitions Inc., d/b/a Cycle Sport Unlimited ("Cycle Sport") protested the establishment of a new dealer in Leesburg Virginia. (Yamaha Ex. 11 at ¶ 15.) The Commissioner granted Cycle Sport a formal adversary hearing, but before the Commissioner could hold that hearing, Cycle Sport withdrew the protest. (*Id.* at ¶ 17.)

began the Amended Decision by assessing the purpose of the General Assembly in enacting the Second Paragraph:

> Although the language is not as artfully drawn as might have been desirable, it is clear that the primary objective of [the Second Paragraph] was to afford added protection to motorcycle dealers, above and beyond the relevant market area protection provided by [the First Paragraph]. It is not entirely clear why such additional protection was provided only in the motorcycle dealer provisions and not in the motor vehicle dealer provisions (Va. Code § 46.2-1569), but presumably the 10, 15 and 20 mile limits on the definition of relevant market area applicable to both motorcycles and motor vehicles (*compare* Va. Code § 46.2-1500 to § 46.2-1993) might be considered less meaningful geographic limits for motorcycle dealers because there are far fewer franchised motorcycle dealers than motor vehicle dealers in Virginia.

(Joint App. Ex. 2 at 4-5.) The Commissioner then noted that, in accordance with the Reminder Letter sent to all motorcycle manufacturers, the Second Paragraph required that notice be sent to all existing dealers of a particular line-make throughout the Commonwealth, not merely the existing dealers in the same "city, county or town" as Yamaha had urged. (*See id.* at 5.)

Having resolved that the Second Paragraph allowed every existing dealer in the Commonwealth the right to protest, the Commissioner then held that not every protest merited a formal evidentiary hearing on the issue of inadequate representation. (*Id.* at 5-6.) Rather, a formal hearing would only be permitted where a protesting dealer makes a preliminary showing in an informal fact-finding proceeding, prior to the appointment of a hearing officer, that it actually represents, "in a not insubstantial way,"

the line-make of motorcycles in the "county, city or town" where the new dealer would be located. (*Id.* at 6.) A protesting dealer can meet this burden only by proving that it "actually represents the line-make by having a *not insubstantial number of sales*" in the relevant country, city or town. (*Id.* at 8 (emphasis added).) The Commissioner then concluded that the relevant geographic market for the purpose of determining the ultimate issue of inadequate representation at the formal evidentiary hearing was to be the "county, city or town" in which the manufacturer intended to open the new franchise, rather than the area likely to be served by the new dealer as Atlas had urged.[6] (*Id.* at 7.)

Having interpreted the statute and fleshed out the protest procedures, the Commissioner then concluded that Atlas actually represented the Yamaha line-make in Russell County by conducting a not insubstantial number of sales (14) to customers in Russell County during the calendar years 1997, 1998, 1999 and 2000. (*Id.* at 9.) The Commissioner noted that the 14 Yamaha motorcycles sold to consumers in Russell County represented 6% of Atlas's Yamaha brand sales, and 58% of the total Yamaha brand sales in Russell County. (*Id.*) Based on these figures, the Commissioner determined that "Atlas does actually represent the Yamaha line-make in Russell County and that representation is not insubstantial or de minimus or incidental or accidental[,]" and as a consequence, Atlas

[6] As noted above, the Supreme Court of Virginia has since held that the relevant geographic market for the purpose of determining the ultimate issue of inadequate representation is the geographic area likely to be served by the new dealer, not the county, city or town of the new dealer. *Yamaha*, 571 S.E.2d at 126, 127.

was entitled to a formal evidentiary hearing on the question of inadequate representation. (*Id.* at 9-10.)

Finally, although not necessary to decide whether Atlas was entitled to bring a Second Paragraph protest, the Commissioner took the opportunity to comment on the term "inadequate representation" in order to guide the decision-makers in further proceedings. (*Id.* at 10-13.) The Commissioner was unable to ascertain a precise definition, but he did find that the following factors – adapted from subsection D of § 46.2-1993.73, which lists factors relevant to the determination of whether there is "good cause" for a proposed action initiated by a person under subdivisions 3, 4, 5, 6, and 9 of § 46.2-1993.67 – to be relevant:

> 1. The volume of the affected dealer's business in the county, city or town wherein the proposed dealer would be located;
>
> 2. The nature and extent of the dealer's investment in its business in or related to that county, city or town;
>
> 3. The adequacy of the dealer's service facilities, equipment, parts, supplies, and personnel as they relate to residents of that county, city or town;
>
> 4. The effect of the proposed action on the county, city or town;
>
> 5. The extent and quality of the dealer's service under motorcycle warranties for the residents of that county, city or town;
>
> 6. The dealer's performance under the terms of its franchise in or related to that county, city or town; . . .
>
> 7. Other economic and geographical factors reasonably associated with the proposed action[; and]

> [8. The market penetration of the protesting dealer into the county, city or town wherein the prospective dealer intends to locate.]

(*Id.* at 11-12.) The Commissioner closed with the observation that:

> I recognize that this interpretation may mean that existing dealers located outside the county, city or town wherein the proposed dealer is to be established will be less likely to qualify for protection under [the Second Paragraph] (as compared to existing dealers located within that county, city or town), but I believe that may well have been the intended result. In any event, *I believe that it is the volume of vehicles sold and the market penetration in the county, city or town where the new dealership is to be established that should be the primary consideration in proving whether the protesting dealer is providing "inadequate representation."*

(*Id.* at 12 (emphasis added).)

3. The Procedure Applied: The Harley-Davidson Protest

On May 14, 2002, Harley-Davidson sent notice to its Virginia dealers that it intended to authorize a new dealership in Prince George County, Virginia. (Quillian Ex. 3 at 2.) On June 12, 2002, H.D. Motorcycles Sales Inc., which does business under the name Richmond Harley-Davidson and South Richmond Harley-Davidson ("HDM"), filed a protest under both the First and Second Paragraphs. (*Id.* at 1.) The Commissioner then requested that the parties submit information relevant to two preliminary questions: (1) whether the proposed dealership was within HDM's relevant market area, therefore entitling

HDM to a hearing under the First Paragraph; and (2) whether HDM represented the Harley-Davidson line-make in Prince George County in a not insignificant or insubstantial way, thereby entitling HDM to a formal evidentiary hearing under the Second Paragraph. (*Id.* at 1-2.)

The parties submitted this information, and, on August 27, 2002, the Commissioner issued his decision. The Commissioner first concluded that the proposed dealer was not within HDM's relevant market area, and therefore HDM was not entitled to a formal evidentiary hearing under the First Paragraph. Next, the Commissioner concluded that HDM, in fact, represented the Harley-Davidson line-make in a not insignificant or insubstantial way, and thereby authorized a formal evidentiary hearing on the question of adequate representation. (*Id.* at 3.)

Several aspects of the Commissioner's ruling respecting the extent of HDM's penetration into the Prince George County market are noteworthy. First, as in the Atlas challenge, the parties presented conflicting evidence respecting the extent of the protesting dealer's sales in the county, city or town of the prospective dealer. (*Id.* at 3.) Rather than resolve the factual dispute, the Commissioner concluded that even the lower figure, which showed market penetration by HDM into Prince George County geographic market for Harley-Davidson motorcycles of 14.9% in 1999, 15.9% in 2000, and 16.7% in 2001, constituted "a not insignificant or insubstantial" level of representation, thereby warranting a formal evidentiary hearing. (*Id.* at 3, 5.)

Second, and likewise similar to the Atlas challenge, the Commissioner noted that, even if the lower figure did

not rise to the level of not insubstantial representation, he nevertheless would have authorized a formal evidentiary hearing to resolve the factual dispute respecting representation. (*Id.* at 5.) In other words, the Commissioner has interpreted the Second Paragraph to mean that the protesting party only need produce some evidence showing that it sold a not insignificant number of motorcycles in the county, city or town, whether or not that data is corroborated by evidence proffered by the manufacturer.

4. The Procedure Refined: The Commissioner's February 26, 2003 Letter To Motorcycle Manufacturers And Dealers

Based on his experience with the Atlas and HDM protests, and in light of the Supreme Court of Virginia's November 1, 2003 opinion respecting this Court's certified questions, the Commissioner sent a letter to all motorcycle manufacturers and dealers on February 26, 2003 that refined the procedures for Second Paragraph protests. First, the Commissioner explained that the notice sent to existing dealers must contain certain minimum information, including:

> (1) the franchisor's present intent to establish a new franchise dealer of the franchisor's line-make;
>
> (2) the street address or, if no street address is available, a reasonable approximation of the street address, or precise location where the newly proposed new dealer is intended to be established;
>
> (3) the name of the county, city or town in which the proposed new dealer is intended to be established; and

> (4) whether or not the proposed new dealer will be located within the relevant market area of the dealer being notified.

(Quillian Ex. 5 at 2.) The critical information in this notice, explained the Commissioner, is the proposed site for the new dealer:

> [T]he notice must be provided at a time when the franchisor's intent has at least progressed to the point that a proposed site has been identified by the franchisor, and the proposed site must be identified in the notice by a street address where possible and the name of the county, city or town where the proposed new franchise dealer is to be established ... [B]ecause statutory protections for existing dealers are tied to geographical locations, the notice concerning the proposed establishment of a new franchise dealer must be specific as to the franchisor's intent to establish the new franchise dealer and the intended location of the new franchise dealer.

(*Id.*) The Commissioner then emphasized that such notice must be sent at least 45 days prior to the establishment of the new dealership, and that the 30-day time period for existing dealers to request a hearing or to file a protest would not begin to run until the franchisor has notified the Commissioner that it has satisfied the notice requirements. (*Id.*)

Second, the Commissioner dictated separate procedures for resolving protests arising under the First and Second Paragraphs and explained that a protesting dealer must specify whether its protest arises under the First or Second Paragraphs. For Second Paragraph protests, the dealer, at a minimum, must provide, as part of the protest, information showing, *inter alia,* the number of units the

dealer has sold to residents of the county, city, or town where the new dealer will locate. The manufacturer then would have two weeks to contest the request for a hearing by submitting specific types of sales and market share information for the preceding three years to show any asserted inadequate representation. In addition, the Commissioner stated that parties would be allowed to submit additional information in support of their positions for four weeks after the date on which the DMV received the protest, with little or no restrictions – *i.e.*, the type of information the parties may submit at this point is almost entirely open-ended, with the only condition being that the party submitting the additional information must explain why it is relevant. (*Id.* at 5; 3/1/03 Tr. (Testimony of Jo Anne Maxwell) at 372:24 – 375:4.)

Next, the Commissioner explained that, within 40 days of the receipt of the protest (or, 12 days after receiving all relevant information from the parties), the Commissioner would determine whether to grant a formal evidentiary hearing, with the standard presumably being that which the Commissioner had applied in the Harley-Davidson protest. If the Commissioner grants a hearing, that hearing would be held within 90 days of the protest. (*Id.* at 5.)

Finally, the Commissioner modified the inquiry to be conducted at any formal evidentiary hearing in light of the opinion of the Supreme Court of Virginia. Rather than inquiring whether there is inadequate representation in the county, city or town where the prospective dealer would be located, the Commissioner would decide, as instructed by the Supreme Court, "whether there is inadequate representation of the line-make in the market

area likely to be served by the new franchise dealer." (*Id.* at 5.)

B. The Practical Effect Of The Statute As Enforced By The Commissioner

The Second Paragraph, and the procedures that the Commissioner has adopted to enforce it, create a significant hurdle for manufacturers and their prospective new dealers. Although, at first blush, the Commissioner seems to have created a procedure that allows for non-meritorious protests to be disposed of within 40 days of the filing of a protest and five days before the dealer intends to open, the reality is not that simple. First, the Commissioner's track record in efficiently resolving protests under both the First Paragraph and the analogous provision respecting the establishment of automobile dealerships is not good. (*See* Quillian Ex. 6.) Indeed, the Commissioner frequently has failed to meet the 90-day limit set by statute for resolving those protests. (3/1/03 Tr. (Maxwell) at 274:1-278:9, 320:10-321:14, 333:8-335:8.) Therefore, the Commissioner's promise to resolve Second Paragraph protests in a timely manner rings rather hollow. Second, Virginia's Administrative Procedures Act allows a protesting dealer to appeal a decision denying a formal evidentiary hearing to a Virginia Circuit Court, and then to the Virginia Court of Appeals, a process that could take years. (3/1/03 Tr. (Maxwell) at 354:23-355:12.) Therefore, even a frivolous protest to which the Commissioner responds with uncharacteristic dispatch could take years to resolve.

Finally, the standards for determining whether a hearing should be granted and whether a protest should be upheld are highly subjective. Respecting the degree of

market penetration into the county, city or town of the prospective dealer that a protesting dealer must show in order to get a formal evidentiary hearing, the commissioner has not provided clear guidance. The "not insubstantial" representation standard is remarkably vague, and the Commissioner's decisions on the Atlas and HDM protests provide little additional explanation. At most, manufacturers know that an existing dealer with a market penetration of as little as 14.9% may satisfy the standard. But, although the 14.9% figure relied upon in the HDM protest was the percentage of new motorcycle sales by HDM in the county, city or town of the new dealer, the Commissioner has indicated that new motorcycle sales *may* not be the only relevant factor. Other "relevant" information such as sales of used motorcycles, warranty and other service visits, or even advertising, may also be considered. (3/1/03 Tr. (Maxwell) at 372:14-374:13; Yamaha Ex. 25 at 32:17-35:14; Yamaha Ex. 27 at 5-6.) To complicate matters further, the Commissioner has demonstrated in both the HDM and Atlas protests that, in determining whether or not to grant a hearing, the protesting dealer will be given the benefit of the doubt in cases where the parties present inconsistent data respecting "not insubstantial" representation. As a consequence, a manufacturer cannot predict with any certainty whether any of the potential protests that might result from an attempt to open a new dealership will actually advance to the formal evidentiary hearing phase, (Yamaha Ex. 25 at 151:18-153:23), and must assume that, given the lack of a clearly defined standard and the Commissioner's bias in favor of granting the hearing, that it will be subjected to the full administrative process, the result of which can be contested in subsequent judicial proceedings.

The fact that a frivolous protest could tie up a manufacturer and prospective dealer for months takes on greater significance when one takes into consideration Yamaha's method of allocating motorcycles to its dealers. For reasons not relevant to the present case, Yamaha, like other motorcycle manufacturers, uses a national allocation program to distribute motorcycles to its dealers, based primarily on product availability and the dealer's prior sales. (2/14/03 Tr. (Testimony of Dennis McNeal) at 51:25-53:11; *id.* (Testimony of Gene Ostrom) at 119:7-120:8.) Because demand for motorcycles has outstripped Yamaha's production capabilities in recent years, (*id.* (McNeal) at 9:10-11:11), dealers are constantly in need of top-selling models. But, because allocations are set through the national allocation system, dealers cannot simply order more top-selling units, but rather may receive units only in accordance with the national allocation program. (*Id.* (McNeal) at 21:13-23:22.) Therefore, existing dealers are constantly seeking from the manufacturers additional allocation of the best-selling products. (*Id.* (McNeal) at 11:6-11:11.)

Given the tight supply of top-selling units, an existing dealer has the economic incentive to file a protest of questionable merit in order to gain bargaining leverage. Both expert economists that testified in this case, Dr. Nancy Lutz for Yamaha, and Dr. Michael J. Ileo for the Defendants, concluded that given the constant demand for more product, existing dealers have the incentive to file a protest, whether meritorious or not, to create leverage to extract more product from the manufacturer. (*Id.* (Testimony of Nancy Lutz) at 196:23-198:13; Yamaha Ex. 24 at 63:2-63:18.) The HDM protest provides the paradigm of a dealer using a protest as leverage. As noted above, HDM

protested Harley-Davidson's proposed establishment of a new dealer, even though the proposed new dealership was outside the relevant market area as defined in the First Paragraph. In an offer to settle its Second Paragraph protest, HDM offered to drop its protest in exchange for a sixty percent increase in motorcycle allocation to its current dealership location, and conversion of a secondary retail location into a full dealership, which would result in additional motorcycle allocations for that store. (2/14/03 Tr. (Ostrom) at 115:21-117:5, 156:5-157:8.) Harley-Davidson refused to accede to HDM's demand, and the protest remains unresolved to this date, (*id.* (Ostrom) at 117:3-117:5), but the HDM protest nonetheless demonstrates the economic incentive for existing dealers to file protests, and supports the conclusion that Second Paragraph protest are virtually certain to occur every time a manufacturer seeks to open a new dealership in the Commonwealth, if only as a means of creating bargaining leverage.

The virtual certainty of a protest is exacerbated by the fact that, as described above, prospective dealers must have identified a definite location for their business prior to sending out notice. (Quillian Ex. 5 at 2.) Unfortunately, the uncertainty surrounding the protest process makes it difficult for prospective dealers to make the commitment necessary to secure such a location, either through a lease, option to buy, or outright purchase of the location. (2/14/03 Tr. (McNeal) at 60:9-61:3.) Even though the Commissioner does not technically require the prospective dealer to have secured a physical street address in order to survive a protest, prudence would dictate that he do so in order to prevent another individual from taking the proposed location during the protest period. (3/1/03 Tr. (Maxwell) at

336:21-338:10.) Indeed, the Commissioner's key witness on the procedures, Ms. Maxwell, testified that, in reality, the new site had to be under the proposed new dealer's control. (*Id.* (Maxwell) at 337:15-338:10.) But, without commitment letters from manufacturers, which the manufacturers would be reluctant to provide when a protest is a virtual certainty, prospective dealers are unlikely to be able to secure the financing necessary to secure a location. (2/14/03 Tr. (McNeal) at 61:6-61:16; *id.* (Testimony of Robert Braun) at 87:3-87:25.)

As a result of these economic realities, both Yamaha and Harley-Davidson have decided to forego establishing new dealers in Virginia and, instead, to devote their capital and business expansion efforts in other states. (*Id.* (McNeal) at 24:6-24:22; *id.* (Braun) at 88:5-88:13; *id.* (Ostrom) at 129:17-130:17.) Yamaha has identified three qualified dealer prospects in Virginia, including the prospective Rosedale dealer, but has decided not to pursue those opportunities because of the burdens imposed by the Second Paragraph. (*Id.* (McNeal) at 24:6-24:11; *id.* (Braun) 85:16-87:25; Yamaha Exs. 20 & 21 (filed under seal).) Harley-Davidson similarly has foregone opportunities (apart from the prospective Prince George County dealer presently under protest) to open new dealerships in Virginia, instead opting to devote its resources into opening new dealerships in states with more favorable dealer establishment laws. (2/14/03 Tr. (Ostrom) at 129:17-130:7, 130:17-131:4.) Both Yamaha and Harley-Davidson made these decisions notwithstanding that demand for motorcycles continues to increase.

One consequence of the decisions by Yamaha and Harley-Davidson to forego attempts to open new distribution points during a period of increasing demand is a

relative reduction in intrabrand and interbrand competition. As a matter of economic theory, one would expect such reductions to lead to higher prices for consumers. (2/14/03 Tr. (Ostrom) at 131:13-132:25; *id.* (Lutz) at 210:20-211:11, 221:24-222:12.) However, notwithstanding the thoroughly uncontroversial nature of this conclusion as a matter of economic theory, there is no evidence in the record that the reduction in intrabrand and interbrand competition actually has resulted in higher prices for Virginia consumers.

Furthermore, there is no record evidence indicating that the inability of Yamaha and Harley-Davidson to open new dealerships in the present regulatory climate has had any effect whatsoever on the sale of motorcycles in the Commonwealth. In 1996, 7123 total motorcycles were sold in Virginia. (Atlas Ex. 8 at Y00206.) In the first eleven months of 2002, 19,205 total motorcycles were sold in Virginia, (Atlas Ex. 12 at Y00230), an increase approaching 300%. And, Yamaha itself has done well. Even though it has had to rely on its existing dealer network, Yamaha's Virginia sales have more than tripled, (2/14/03 Tr. (McNeal) at 42:25; Atlas Exs. 8 & 12), while Yamaha's national sales have only roughly doubled. (2/14/03 Tr. (McNeal) at 38:24.) Of course, it is impossible to know what Yamaha's numbers would have been had it been able to open new points of distribution, and executives at Yamaha certainly believe that had they been able to open three new distribution points, they would have delivered more product into the Commonwealth. (2/14/03 Tr. (McNeal) at 24:20-24:22; *id.* (Braun) at 88:1-88:3.) Nevertheless, the concrete evidence suggests not only that Yamaha's existing dealer network has been adequate to meet growing consumer demand, but also that this network has outperformed Yamaha's nationwide network.

The foregoing facts provide the framework within which to assess Yamaha's contention that the Second Paragraph offends the dormant Commerce Clause.

DISCUSSION

The Commerce Clause of the United States Constitution empowers Congress "[t]o regulate Commerce ... among the several States." U.S. Const., Art. I, § 8, cl. 3. Although phrased as a grant of power to Congress rather than a restriction on the powers of the several States, the Supreme Court has held repeatedly that the Commerce Clause "directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma,* 502 U.S. 437, 454, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992); *see New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273, 108 S.Ct. 1803, 100 L.Ed.2d 302, (1988); *Hughes v. Oklahoma,* 441 U.S. 322, 326, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979); *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 534-35, 69 S.Ct. 657, 93 L.Ed. 865 (1949); *Welton v. Missouri,* 91 U.S. 275, 280-81, 23 L.Ed. 347 (1875). This is so because the primary objective of the Commerce Clause is to "preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *General Motors Corp. v. Tracy,* 519 U.S. 278, 299, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997); *see also* The Federalist No. 42 (J. Madison).[7] "This principle that our economic unit is the

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[7] As the Supreme Court has noted,

> [t]he "negative" aspect of the Commerce Clause was considered the more important by the "father of the Constitution," James Madison. In one of his letters, Madison wrote that the Commerce Clause "grew out of the abuse of the power by the importing

(Continued on following page)

Nation, which alone has the gamut of powers necessary to control of the economy, . . . has as its corollary that the states are not separable units." *H.P. Hood & Sons,* 336 U.S. at 537-38, 69 S.Ct. 657. Therefore, "the Commerce Clause . . . 'denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.'" *Waste Management Holdings, Inc. v. Gilmore,* 252 F.3d 316, 333 (4th Cir. 2001) (quoting *Oregon Waste Sys., Inc. v. Department of Envtl. Quality,* 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994)).

In evaluating whether a state has exceeded the restrictions of the "negative," or "dormant," aspect of the Commerce Clause, courts apply a two-tiered approach, under which the level of scrutiny to which the enactment is subjected depends upon whether the statute discriminates against interstate commerce. *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). The first tier is a *per se* rule of invalidity that applies where a state law discriminates facially, in its practical effect, or in its purpose. *Environmental Tech. Council v. Sierra Club,* 98 F.3d 774, 785 (4th Cir. 1996). In order for a law to survive the *per se* rule, "the state must prove that the discriminatory law is

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States in taxing the non-importing, and was intended as a negative and preventative provision against injustice among the States themselves, rather than as a power to be used from the positive purposes of the General Government."

West Lynn Creamery v. Healy, 512 U.S. 186, 193 n. 9, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (quoting 3 M. Farrand, Records of the Federal Convention of 1787, p. 478 (1911)).

demonstrably justified by a valid factor unrelated to economic protectionism, and that there are no nondiscriminatory alternatives adequate to preserve the local interests at stake[.]" *Id.* (internal citations and quotation marks omitted); *accord Brown & Williamson Tobacco Corp. v. Pataki,* 320 F.3d 200, 209 (2d Cir. 2003); *McNeilus Truck and Mfg., Inc. v. Ohio,* 226 F.3d 429, 442 (6th Cir. 2000).

Where the state law does not discriminate either facially, in purpose, or in practical effect, but nonetheless indirectly affects interstate commerce, the second tier applies. Under the second tier, the court must balance the burden on commerce against the local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.*

Here, Yamaha has alleged that the Second Paragraph violates both the *per se* rule and the *Pike* balancing test. According to Yamaha, the Second Paragraph is discriminatory in purpose and effect, and the burden on interstate commerce created by the Second Paragraph clearly exceeds the putative local benefits that it may provide.

A. Whether the Second Paragraph Discriminates Against Interstate Commerce In Its Purpose Or Practical Effect

As mentioned above, a plaintiff challenging a statute under the dormant Commerce Clause may prove that the

provision is discriminatory by proving (1) that the provision discriminates on its face; (2) that the purpose of the statute is discriminatory; or (3) that the practical effect of the statute is discriminatory. *Waste Management Holdings,* 252 F.3d at 333. Here, the parties seem to agree, and correctly so, that the Second Paragraph is facially neutral. By its own terms, the Second Paragraph makes no distinction between in-state and out-of-state manufacturers or dealers. Therefore, the Second Paragraph is discriminatory, if at all, in its purpose or in its practical effect, or both.

1. Legitimate State Purpose

As explained above, the purpose of the General Assembly in enacting the Second Paragraph is not entirely clear, but the principal effect of the provision is to give existing dealers of motorcycles increased protection against the opening of new points of distribution by manufacturers. That, and the fact that the Second Paragraph was added to a statute that the General Assembly is presumed to have known to be a motorcycle dealer protective device because of a previous Fourth Circuit decision, is sufficient to permit the conclusion that the General Assembly intended to confer on motorcycle dealers a kind of protection that was both greater than that afforded under the First Paragraph and greater than that afforded automobile dealers. Given the state of the market for new motorcycles at the time the provision was passed and the fact that the existing protections were plausibly less effective than the protections available to automobile dealers, it is plausible that the General Assembly acted with the purpose of achieving increased protection for motorcycle dealers. This conclusion confirms the independent observations of both

the Supreme Court of Virginia and the Commissioner that "the primary objective of [the Second Paragraph] was to afford added protection to motorcycle dealers, above and beyond the relevant market area protection provided by [the First] Paragraph." *Yamaha,* 571 S.E.2d at 127 (quoting the Amended Decision) (alterations in original). Obviously, the Supreme Court and the Commissioner based their assessments of purpose on the effect of the Second Paragraph and its place in a protective statutory scheme because there is no other record evidence to support that assessment.

The legitimacy of this general purpose is largely resolved by the decision in *American Motors,* 592 F.2d at 222-23, wherein the Fourth Circuit considered a dormant Commerce Clause challenge to an earlier version of § 46.2-1993.67(5) (respecting automobile dealers) that is substantially similar to the First Paragraph. Relying on the Supreme Court's decision in *Orrin W. Fox Co.,* 439 U.S. at 100-08, 99 S.Ct. 403, the Fourth Circuit held that, in light of the "disparity in bargaining power between automobile manufacturers and their dealers," states may legitimately enact legislation to "protect[] the equities of existing dealers by prohibiting manufacturers from adding dealerships to the market areas of its existing franchisees, where the effect of such intra-brand competition would be injurious to the existing franchisees and to the public interest" in furtherance of the legitimate state purpose of "the promotion of fair dealing and the protection of small business." *American Motors,* 592 F.2d at 222 (citing *Orrin W. Fox Co.,* 439 U.S. at 100-02, 99 S.Ct. 403) (internal quotation marks omitted). Stated differently, "the state legislature 'was empowered to subordinate the conflicting rights of their franchisees where necessary to prevent

unfair or oppressive trade practices.'" *Id.* (citing *Orrin W. Fox Co.*, 439 U.S. at 107, 99 S.Ct. 403). The General Assembly's purpose in modifying § 46.2-1993.67(5) was the same as that behind the original statute found to be legitimate in *American Motors*. To be sure, the General Assembly has decided to employ new means to achieve that purpose, but the purpose itself remains the same.

Yamaha argues that the manner in which the Second Paragraph has come to be enforced indicates that the intent behind it was protectionist, and therefore illegitimate. Although Yamaha is correct that the VMDA lobbied the Commissioner successfully to enforce the requirements of the Second Paragraph (Yamaha Ex. 1), and that the VMDA has lauded the protections afforded by the provision (Yamaha Ex. 2), that evidence is neither relevant to the question of legislative intent, nor indicative of any deviation from the purpose identified in *American Motors*. The focus of the inquiry here is on the intent of the legislature, not the intent of state executives, and Yamaha's observation that the active enforcement of the statute was brought about by the lobbying efforts of the VMDA provides no insight into the intent of the legislature. Furthermore, even if this evidence were relevant to the question of legislative intent, it is not at odds with the purpose affirmed in *American Motors*. The VMDA wanted the Second Paragraph enforced in order to force manufacturers to justify opening a new point of distribution while failing to meet the needs of existing franchisees. This is a species of the ill that is legitimately addressed by the First Paragraph – *i.e.*, the trade practice of fostering destructive intrabrand competition. To accept Yamaha's argument would require this Court to ignore the Fourth Circuit's

unequivocal holding in *American Motors,* a course that is decidedly impermissible.

2. The Practical Effects Of The Second Paragraph

In assessing practical effects of challenged legislation, the Court must focus on the probable effect of the statute, without regard to its name or its intended purpose. *See Lewis v. BT Investment Managers, Inc.,* 447 U.S. 27, 37, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) (citing *Hughes,* 441 U.S. at 336, 99 S.Ct. 1727 and *Best & Co. v. Maxwell,* 311 U.S. 454, 455-56, 61 S.Ct. 334, 85 L.Ed. 275 (1940)). As the Fourth Circuit has explained, "[t]he obvious focus of the practical effect inquiry is upon the discernable practical effect that a challenged statutory provision has or would have upon interstate commerce as opposed to intrastate commerce." *Waste Management Holdings,* 252 F.3d at 335. A plaintiff satisfies its burden by merely demonstrating the existence of a discriminatory effect apart from the extent of that effect. *See Wyoming,* 502 U.S. at 455, 112 S.Ct. 789 ("volume of commerce affected measures on the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce."); *Limbach,* 486 U.S. at 276-77, 108 S.Ct. 1803 (holding that the size or number of in-state interests favored is irrelevant to analysis of discriminatory effect).

Although, at first blush, the Supreme Court has been seemingly unequivocal in declaring that state laws run afoul of the dormant Commerce Clause when they have the "practical effect" of benefitting in-state economic

interests at the expense of out-of-state economic interests,[8] closer analysis reveals that the definition of "discrimination" is not so broad. Rather, only those state laws that discriminate among in-state and out-of-state *competitors* (*i.e.*, entities similarly situated in the chain of commerce) violate the dormant Commerce Clause. *Tracy*, 519 U.S. at 298-300, 117 S.Ct. 811; *see Lewis*, 447 U.S. at 41-42, 100 S.Ct. 2009; *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-26, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *Hunt v. Washington State Advertising Comm'n*, 432 U.S. 333, 348-53, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 582 n. 16, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997); *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 501-02 (5th Cir. 2001); *Maharg v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544, 553-54 (6th Cir. 2001).[9] As the Supreme Court explained in *Tracy*, "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." 519 U.S. at 300, 117 S.Ct. 811.

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[8] *See e.g., Oregon Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345 ("'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter").

[9] *But see Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981) (finding a state law that benefitted in-state pulpwood producers at the expense of out-of-state plastic resin producers to be constitutional, in spite of the fact that these entities arguably competed in the market for the materials used to produce milk containers).

Yamaha raises a novel discriminatory effects argument here. Although the Second Paragraph directly affects only motorcycle manufacturers (of which where [sic] [there] are none in Virginia) and prospective dealers in Virginia, Yamaha notes that, as a consequence of the state-wide protest provision, and the "evolving" regulatory process for resolving such protests, the Second Paragraph confers a benefit on incumbent Virginia dealers at the expense of existing dealers in other states. Specifically, the protest provision gives existing dealers the incentive to file protests, whether meritorious or not, whenever a manufacturer announces its intent to open a franchise anywhere in the Commonwealth, because doing so gives the existing dealer leverage that could be used to extract product-allocation concessions from its manufacturer. Because the supply of motorcycles is limited, argues Yamaha, such concessions necessarily come at the expense of other dealers. And, as a function of Virginia's equitable allocation law,[10] such concessions must come at the expense of other dealers *in other states*. Furthermore, once such a concession is made, the equitable allocation provision dictates that the benefitting Virginia dealers will be entitled to increased product allocation from that point forward. Thus, the Second Paragraph has the "discriminatory effect" of granting added bargaining power to incumbent Virginia dealers to

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[10] *See* Code of Virginia § 46.2-1993.67(9). The equitable allocation provision makes it unlawful for a motorcycle manufacturer:

> To fail to ship monthly to any dealer, if ordered by the dealer, the number of new motorcycles of each make, series, and model needed by the dealer to receive a percentage of total new motorcycle sales of each make, series, and model equitably related to the total new motorcycle production or importation currently being achieved nationally by each make, series, and model covered under the franchise.

extract greater product allocations over the long term, at the expense of out-of-state dealers.

The evidence supporting Yamaha's product allocation theory is somewhat limited. First, the expert economists for both Yamaha and Atlas both testified that the Second Paragraph gave incumbent dealers the economic incentive to file a protest, regardless of merit, whenever a manufacturer proposed to open a new point of distribution in the Commonwealth. Dr. Lutz, Yamaha's expert, testified that, because a dealer protest significantly delays the establishment of the new dealer and imposes other costs and burdens on the manufacturer, existing dealers had an economic incentive to take advantage of the broad rights granted under the Second Paragraph to demand preferential product allocation and other concessions from manufacturers. (2/14/03 Tr. (Lutz) at 196:23-198:13.) Dr. Ileo, Atlas' expert, likewise conceded that, from a purely economic perspective, it would be acceptable for existing dealers to use any legal means available to enhance sales and profitability. (Yamaha Ex. 24 at 63:2-63:18.) Second, Harley-Davidson actually encountered such a demand in connection with the HDM protest, where HDM demanded a 60 percent increase in allocation in exchange for HDM dropping the protest. At first blush, therefore, the product allocation leverage effects that Yamaha has identified seem to be plausible discriminatory effects.

However, Yamaha has produced no evidence indicating that any manufacturer has bowed to such pressure in the face of a protest. Indeed, in the Harley-Davidson case, the only instance where an existing dealer explicitly has used a protest as a means of extracting product, Harley-Davidson has not acceded to the demand, and has indicated that it will never accede to such a demand. (2/14/03

Tr. (Ostrom) at 154:1-154:12, 155:17-155:23.) And, even if a manufacturer were to acquiesce to such blackmail, it is unclear whether, in fact, the result would be a diminution in the product allocation of out-of-state dealers. For example, a manufacturer could satisfy an extortionate request for increased allocation as a means of settling a protest by allocating surplus product resulting from cancelled orders. (2/14/03 Tr. (McNeal) at 53:22-54:20.) Therefore, although the Second Paragraph may create an economically rational basis for existing dealers to file protests of questionable merit, the resolution of which may be lengthy and costly for the manufacturer, as a means of extracting more product, the evidence simply does not support the further, and constitutionally significant conclusion that such extortionate protests have actually resulted in reduced product allocations for out-of-state dealers. In short, the discriminatory effect that Yamaha complains of is speculative, and therefore not an appropriate basis for finding the Second Paragraph discriminatory. *See Arkansas Elec. Co-op. Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 395, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983); *Exxon*, 437 U.S. at 128-29, 98 S.Ct. 2207.

The attenuated and speculative nature of the effect to which Yamaha points is further exacerbated by the lack of evidence respecting whether any out-of-state dealers actually compete in the same market as Virginia dealers. To be sure, a dealer like Atlas in a border area like Bristol, Virginia likely competes against Yamaha-brand dealers in Tennessee at least, and perhaps North Carolina and West Virginia as well. But, the evidence does not reveal the identity of such competitors, let alone whether such competitors have suffered from reduced product allocation as a result of Second Paragraph extortion on the part of an

existing Virginia dealer. It would be impermissible to infer such an adverse effect when the record is that the manufacturers have not acceded to extortionate allocation demands and have no intent to do so.

Finally, even if Yamaha had produced some evidence that the Second Paragraph actually resulted in the discriminatory effects that Yamaha asserts, the Second Paragraph would still survive scrutiny under the discriminatory effects test because the discriminatory effect is a function of Yamaha's business model. The Supreme Court has rejected time and again the "notion that the Commerce Clause protects the particular structure or methods of operation in a market." *Exxon,* 437 U.S. at 127, 98 S.Ct. 2207; *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 93-94, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987). An essential facet of Yamaha's discrimination theory is that manufacturers like Yamaha distribute motorcycles to their dealerships through a competitive allocation system. A system of that sort is not an inevitable feature of the motorcycle market, but rather is merely a "method of operation." Under an on-demand allocation system, the effect simply would not exist. Such a system may be inefficient and burdensome on manufacturers, and thereby ultimately harmful to consumers, but those harms relate to the wisdom of the statute, not to its discriminatory effect on commerce. *See Exxon,* 437 U.S. at 128, 98 S.Ct. 2207.

C. *Pike* Balancing

Having concluded that the Second Paragraph regulates even-handedly and does not discriminate against interstate commerce facially, in its effect or in its purpose,

it is necessary next to determine whether the Second Paragraph satisfies the *Pike* balancing test. In *Pike,* the Supreme Court held that:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike, 397 U.S. at 142, 90 S.Ct. 844 (internal citation omitted). Thus, *Pike* requires the court to consider three elements: "(1) the nature of the local benefits advanced by the statute; (2) the burden placed on interstate commerce by the statute; and (3) whether the burden is 'clearly excessive' when weighed against these local benefits." *Star Scientific, Inc. v. Beales,* 278 F.3d 339, 357 (4th Cir. 2002).

1. Local Benefits Advanced By The Statute

As noted above, the goal of the Virginia General Assembly in adding the Second Paragraph to the statute was "to afford added protection to motorcycle dealers, above and beyond the relevant market area protection provided by [the First] Paragraph." *Yamaha,* 571 S.E.2d at 127. And, in *American Motors,* the Fourth Circuit held that the General Assembly "'was empowered to subordinate the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices.'" 592 F.2d at 222 (quoting *Orrin W. Fox Co.,* 439 U.S. at 100-02, 99 S.Ct.

403). However, the fact that the purpose behind the statute is legitimate does not end the local benefits inquiry.

Because *Pike* requires the Court to perform something akin to a cost-benefit analysis, it is necessary also to evaluate the *benefits* arising from the statute. *See Medigen of Kentucky, Inc. v. Public Service Comm'n of West Virginia*, 985 F.2d 164, 166-67 (4th Cir. 1993) ("Under *Pike*, we must examine the extent to which the [state law] promotes local interests, and hence benefits the state, while always being conscious of the degree to which those local interests could be served by other means."). Therefore, the mere fact that Virginia regulated with legitimate purpose means little in this aspect of the analysis. The focus of the inquiry here is on the *benefits* that the statute seeks to effect.

Although the parties agree that the "benefits" of the statute, rather than the mere purpose, are the focus of the inquiry, they disagree as to the degree of deference that the Court should give to the state legislature, and whether the party defending the legislation need introduce any evidence respecting actual benefits. Atlas argues that no such evidence is necessary because courts are supposed to defer to the judgments of state legislatures in this context. Under Atlas's reasoning, the mere fact that the legislature has acted in pursuit of a legitimate end gives rise to the presumption that its means actually accomplish that end. Yamaha, in contrast, argues that such deference is not warranted in this context, and, to the contrary, that the Court must independently determine whether the Second Paragraph actually promotes the putative interests identified by the Commonwealth.

The decisions of the Supreme Court suggest that the inquiry into putative benefits is actually a combination of the two approaches that the parties advance here, and that it is somewhat akin to rational basis review in the equal protection context. The Court is to analyze the evidence available to the legislature at the time it enacted the legislation in question, and determine whether the means chosen are rationally related to legislature's legitimate ends. If the legislation satisfies this test, the Court is to presume that the legislation actually achieves the "local benefits" sought. *See CTS Corp.*, 481 U.S. at 91-92, 107 S.Ct. 1637 (citing *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 679, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981) (Brennan, J., concurring)).

The language the Court used in *Pike* provides the first clue as to the appropriate level of deference. In *Pike,* the Court explained that courts are to consider the "putative" local benefits of the challenged legislation. *See* 397 U.S. at 142, 90 S.Ct. 844. Webster's Third New International Dictionary defined "putative" as "commonly accepted or supposed" or "assumed to exist or to have existed." The use of the modifier putative thus suggests some level of deference: courts are to look at the benefits "assumed to exist or to have existed," or the benefits "commonly accepted or supposed."

Consistent with the language of *Pike,* the Supreme Court, when assessing local benefits under the *Pike* test, has assumed that challenged legislation achieves the benefits sought. In *Pike* itself, the Court ultimately found that the law in question – a requirement that Arizona cantaloupe growers package their cantaloupes in a certain way – violated the dormant Commerce Clause; but, in doing so, the Court assumed that the legislation achieved

its putative end – *i.e.*, the protection and enhancement of the reputation of growers within the state – even if that end was somewhat "tenuous." *See* 397 U.S. at 145, 90 S.Ct. 844. Similarly, in *CTS Corp.*, 481 U.S. at 91-92, 107 S.Ct. 1637, where the Court considered a challenge to an Illinois law regulating corporate takeovers, the Court noted that Illinois had a legitimate interest in regulating tender offers, and then assumed that the statute achieved the ends sought. "We are not inclined 'to second-guess the empirical judgments of lawmakers concerning the utility of legislation.'" *Id.* at 92, 107 S.Ct. 1637 (quoting *Kassel*, 450 U.S. at 679, 101 S.Ct. 1309 (Brennan, J., concurring)).

Although deferential, the standard is not satisfied by mere recitation of a legitimate purpose. Rather, the means the state employs must bear some rational basis to the ends sought. Justice Brennan explained the nature of inquiry in his concurrence in *Kassel:*

> In determining those benefits, a court should focus ultimately on the regulatory purposes identified by the lawmakers and on the evidence before or available to them that might have supported their judgment. Since the court must confine its analysis to the purposes the lawmakers had for maintaining the regulation, the only relevant evidence concerns whether the lawmakers could rationally have believed that the challenged regulation would foster those purposes. It is not the function of the court to decide whether *in fact* the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.

450 U.S. at 680-81, 101 S.Ct. 1309 (emphasis in original) (citations omitted).[11] Although not an opinion of the majority at the time, the Supreme Court and lower courts have come to endorse this approach. *See CTS Corp.*, 481 U.S. at 92, 107 S.Ct. 1637; *Ford Motor Co.*, 264 F.3d at 503-04.[12]

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[11] Because Yamaha hotly contests the significance of Justice Brennan's concurrence in *Kassel*, (Yam. Supplemental Pre-Hearing Brief, docket # 69, at 8 n. 1.), a brief statement about *Kassel* is necessary here.

In *Kassel*, a majority of the Court held that an Iowa law that prohibited the use of 65-foot double trailer trucks on its highways was offensive to the dormant Commerce Clause under the *Pike* test. Four justices held that the burdens on interstate commerce clearly exceeded the putative local benefit of increasing highway safety – a *post hoc* rationale – after a lengthy review of the efficacy of the law in promoting safety. Justice Brennan, joined by Justice Marshall, agreed that the law violated the dormant Commerce Clause, but found that the Court's consideration of the regulation's efficacy as a safety regulation was both unwarranted and unnecessary. Under Justice Brennan's approach, *post hoc* statements of purpose are not cognizable in the local benefits inquiry. Rather, only the purpose actually motivating the legislature is cognizable. Because Justice Brennan believed that the evidence conclusively proved that the state's purpose was protectionist – *i.e.*, an effort to insulate it from a nationwide problem (increasing interstate truck traffic) – he would have found the statute unconstitutional under the *per se* test.

Yamaha asserts that, because Justice Brennan conducted a penetrating view of the state's purpose, Justice Brennan does not actually advocate deference respecting local benefits, his averments notwithstanding. This argument conflates two distinct inquiries – the inquiry into purpose, and the assessment of benefits – and is therefore misplaced.

[12] Indeed, this approach is consistent with the Supreme Court's opinion in *Minnesota v. Clover Leaf Creamery Co.* decided earlier that same term. 449 U.S. at 473, 101 S.Ct. 715. In *Clover Leaf Creamery*, the Court considered whether Minnesota's cardboard container requirement violated the Equal Protection Clause, as well as whether it violated the dormant Commerce Clause. In conducting rational basis review under the Equal Protection Clause, the Court explained that

(Continued on following page)

The Fourth Circuit has demonstrated that this rational basis review has some bite. In *Medigen*, the Court of Appeals considered a West Virginia law requiring that all interstate transporters of medical waste obtain a certificate of convenience and necessity in order to operate within the state. *See* 985 F.2d at 165. The state argued that the benefits of the statute were (1) the prevention of insufficient statewide service, a result they believed would obtain were market entry unregulated, and (2) the prevention of ruinous competition. *Id.* The Fourth Circuit directly questioned the judgment of the West Virginia legislature as to the [sic] both of these putative benefits. Respecting the first, the Court noted that "West Virginia's goal of providing universal service at reasonable rates may well be a legitimate state purpose, but restricting market entry does not serve that purpose." *Id.* at 167. Respecting the second justification, the Court found "no basis in the record . . . for concluding that competition in this market has had or will have any destructive effects. Because the 'ruinous' effects

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Courts must be deferential in assessing whether the enactment is rationally related to a legitimate state end: "States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.* at 464, 101 S.Ct. 715 (internal quotation marks omitted). The Court then found the question of whether the enactment achieved its putative ends to be debatable, at the very least, and found rational basis review to be satisfied. *Id.* Later in its opinion, when conducting the *Pike* balancing test, the Court, without any discussion, referenced the benefits accepted as true under rational basis review, and concluded that the burdens created by the statute did not "clearly exceed" those benefits. *Id.* at 473-74, 101 S.Ct. 715. Thus, the assessment of local benefits under the dormant Commerce Clause requires rational basis means-ends review, and, if the law satisfies that review, the assumption is that the provision achieves those ends.

of competition are entirely speculative, their prevention cannot justify restricting market entry." *Id.* at 167. Thus, although not so acknowledging in the opinion, the Fourth Circuit employed the very test that Justice Brennan laid out in his *Kassel* concurrence. Consonant with that approach, the Court of Appeals concluded that the proffered purposes were legitimate, then reviewed the evidence available to the legislature to assess whether the means employed bore a rational relationship to the ends sought, and found that a rational basis was lacking.

Here, as noted above, the General Assembly's legitimate purpose in amending § 46.2-1993.67(5) was to give motorcycle dealers added protection beyond that provided by the First Paragraph, and evidence available to the General Assembly at the time of passage indicates that the Second Paragraph bears a rational relationship to that end. Having found a rational basis for the provision, the benefits sought to be achieved must be assumed.

Because the *Pike* test requires a comparison of these benefits against the burdens on interstate commerce, some quantification of these benefits is also necessary. This task is difficult at the very least, and is impossible to accomplish with any precision. The purpose of the statute, as described in *American Motors* is to protect the investment expectations of existing dealers. For example, the record here reflects that Atlas recently completed a 4000 square foot expansion of its dealership facility at a cost of over $345,000. (Joint App. Ex. 9 at ¶¶ 3,5.) That expansion was undertaken with the expectation by Atlas that it would need the extra space to serve the growing demand in what Atlas believed to be its exclusive geographic market for the foreseeable future. (*Id.*) With the opening of a dealership in Rosedale, Atlas's return on its investment in expanded

capacity would be diminished measurably. The prevention of this diminution in return caused by the proliferation of dealerships is the identifiable benefit of the statute. Unfortunately, it is impossible to quantify the benefit any further because the diminution in return depends upon variables such as the proposed location and sales capacity of a new dealer and the existing capacity of affected dealers. Therefore, the closest approximation of the benefit achieved by the statute is that some number of existing dealers, who, although located beyond the relevant market area defined by the First Paragraph, serve the geographic market area of a hypothetical prospective dealer in a not insignificant way, will be protected against the diminution in return on their investment in capacity and advertising that would occur should the hypothetical dealer actually open.

2. Burdens On Interstate Commerce

Yamaha identifies three broad categories of economic effects that constitute burdens on interstate commerce: (1) the chilling effect on the establishment of new dealerships; (2) the restriction on the flow of new motorcycles into Virginia; and (3) the harm to Virginia consumers. While Yamaha may be correct in noting that the Second Paragraph creates some of these burdens, none of these effects are cognizable as burdens on interstate commerce in the *Pike* analysis.

As a preliminary matter, it is necessary to emphasize that the burdens on interstate commerce contemplated by the *Pike* test are different from the "discriminatory effects" considered in connection with the *per se* test. That is, if a state law "discriminates" against out-of-state actors in its

practical effect, the enactment is *per se* unconstitutional, and the *Pike* test need not be performed. Unfortunately, courts at all levels of the federal judiciary have not been careful in applying this distinction, and thus have blurred the line between the *per se* test and the *Pike* test by purporting to apply the *Pike* test, when in fact the "burdens on interstate commerce" were discriminatory effects. *See Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989); *see generally* Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L.Rev. 1091 (1986). In *Tracy*, 519 U.S. at 299 n. 12, 117 S.Ct. 811, the Supreme Court itself recognized this analytical dissonance in its own decisions:

> [S]everal cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations, *see, e.g., Pike*[, 397 U.S.] at 145, 90 S.Ct. 844 (declaring packing order "virtually *per se* illegal" because it required business operation to be performed in-state); *Kassel*[,] 450 U.S. [at] 677, 101 S.Ct. 1309 (plurality opinion of Powell, J.) (noting that in adopting invalidated truck-length regulation the State "seems to have hoped to limit the use of its highways by deflecting some through traffic"); *id.*, at 679-687, 101 S.Ct. 1309 (Brennan, J., concurring in judgment) (emphasizing that truck-length regulation should be invalidated solely in view of its protectionist purpose)[.]

The independent utility of the *Pike* test, therefore, is limited to those occasions where the regulation in question is non-discriminatory, but nonetheless burdens interstate commerce in a manner that is clearly excessive when compared to the putative local benefits.

The class of burdens that are properly cognizable under the *Pike* test are quite limited. The Supreme Court has been emphatic that the dormant Commerce Clause does not incorporate any specific economic theory and that statutes that may harm consumers under one economic view are not necessarily unconstitutional as a result. In *Exxon,* the Court explained that:

> the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. It may be true that the consuming public will be injured by [a probable effect of the regulation], but again that argument relates to the wisdom of the statute, not to its burden on commerce.

437 U.S. at 127-28, 98 S.Ct. 2207. Although the Supreme Court has employed some contrary language in a case where it applied the *Pike* test after finding a state law unconstitutional under the *per se* test,[13] several justices, in the Court's more recent cases, have emphasized that the view expressed in *Exxon* is the correct one. *See C & A Carbone,* 511 U.S. at 424-25, 114 S.Ct. 1677 (Souter, J.,

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[13] *See Edgar v. MITE Corp.*, 457 U.S. 624, 643, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (citing as a burden on interstate commerce under the *Pike* test the fact that the statute hindered "[t]he reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition"), *see also Central GMC, Inc. v. General Motors Corp.*, 946 F.2d 327, 334 (4th Cir. 1991) (citing *Edgar* and stating that "[t]he restrictions implicit in the commerce clause are designed ... to prohibit states from hindering the 'reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition' ").

concurring)[14]; *CTS Corp.*, 481 U.S. at 95-96, 107 S.Ct. 1637 (Scalia, J., concurring).

Once economic efficacy is removed from consideration as a burden on interstate commerce under *Pike*, only a narrow class of burdens remain. In *Tracy*, the Supreme Court explained just how narrow this class of cases is. *See* 519 U.S. at 299 n. 12, 117 S.Ct. 811 After noting that conflation of the *per se* and *Pike* tests in some of its own opinions, the Court explained that the only cases where the Court has struck down a "genuinely nondiscriminatory" law have been those cases where the law in question "undermined a compelling need for national uniformity in regulation." *Id.* (citing *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) (conflict in state laws governing truck mud flaps); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) (train lengths); and *CTS Corp.*, 481 U.S. at 88, 107 S.Ct. 1637 ("This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations.")). Thus, only in those cases where the state has regulated in an area for which

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[14] In his concurrence in *C & A Carbone*, Justice Souter explained:

> No more than the Fourteenth Amendment, the Commerce Clause "does not enact Mr. Herbert Spencer's Social Statics . . . [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire*." *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). The dormant Commerce Clause does not "protec[t] the particular structure or methods of operation in a[ny] . . . market." *Exxon*, 437 U.S. at 127, 98 S.Ct. 2207. The only right to compete that it protects is the right to compete on terms independent of one's location.

511 U.S. at 424-25, 114 S.Ct. 1677 (alterations in original).

there is a "compelling need" for national uniformity will a state law create the type of burden that will violate the *Pike* test.

The limitation on the burdens that are cognizable under the *Pike* test is highly significant in this case because the Second Paragraph does create significant economic burdens chilling the opening of new dealerships and thereby, at least in theory, harms consumers by depriving them of the price benefits of rigorous intrabrand and interbrand competition. These effects, however, all relate to the economic efficacy of the Second Paragraph, and thus are not the type of burdens the *Pike* test is meant to address. Importantly, Yamaha has not demonstrated that the Second Paragraph regulates in an area where there is a "compelling need" for national uniformity. Therefore, the Second Paragraph creates no cognizable burdens on interstate commerce, and thus necessarily survives the *Pike* inquiry.

And, even if the deleterious effects of reduced intraband and interband competition were cognizable, Yamaha has produced no evidence showing that prices for motorcycles, in fact, have increased as a result of the Second Paragraph. At most, Yamaha has shown a reduction in competition, but without some evidence quantifying the price effect of that reduction, it is impossible to conclude that this burden clearly exceeds the putative local benefit.

CONCLUSION

For the foregoing reasons, the second paragraph of Code of Virginia § 46.2-1993.67(5) does not violate the dormant Commerce Clause. Accordingly, judgment shall enter in favor of the Defendants.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

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264 Va. 656, 571 S.E.2d 122

Supreme Court of Virginia.
YAMAHA MOTOR CORPORATION, U.S.A.
v.
Asbury W. QUILLIAN, In his Capacity as the Commissioner of the Department of Motor Vehicles, et al.
Record No. 021232.

Nov. 1, 2002.

David P. Murray, Washington, DC, (Kevin M. Miller, Dale City; J. William Boland; Robert M. Tyler, Richmond; Willkie, Farr & Gallagher, Washington, DC; McGuireWoods, Richmond, on briefs), for plaintiff.

Walter A. Marston, Jr.; Jeffrey A. Spencer, Asst. Atty. Gen. (George E. Kostel; Kevin R. McNally; Jerry W. Kilgore, Atty. Gen.; Reed Smith, on brief), for defendants.

Amicus Curiae: Harley-Davidson Motor Company (James J. Briody, Vienna; Nicholas T. Christakos; Sutherland, Asbill & Brennan, Washington, DC, on briefs), in support of plaintiff.

Present: CARRICO, C.J., HASSELL, KEENAN, KOONTZ, and LEMONS, JJ., and COMPTON and STEPHENSON, S.JJ.

Opinion by Senior Justice ROSCOE B. STEPHENSON, JR.

Pursuant to Article VI, Section 1 of the Constitution of Virginia and Rule 5:42, the United States District Court for the Eastern District of Virginia (the Federal Court), by its order entered May 17, 2002, certified four questions of law to this Court. By order entered June 12, 2002, we accepted the certified questions.

I

On July 25, 2001, Yamaha Motor Corporation, U.S.A. (Yamaha) instituted an action in the Federal Court, pursuant to 42 U.S.C. § 1983, against Asbury W. Quillian, the Commissioner of the Virginia Department of Motor Vehicles (the Commissioner), and Jim's Motorcycle, Inc., d/b/a Atlas Honda/Yamaha (Atlas). In its action, Yamaha challenged the second paragraph of Code § 46.2-1993.67(5), which places restrictions on motorcycle manufacturers and distributors who wish to establish new franchise dealers in the Commonwealth (the Second Paragraph). Yamaha alleged that the Commissioner's interpretation and enforcement of the Second Paragraph "unduly interferes with [its] rights to engage in interstate commerce, restrains the establishment of new businesses and employment opportunities in Virginia, and deprives Virginia consumers of the benefits of lawful intrabrand competition." Accordingly, Yamaha asked the Federal Court to (1) declare that the Second Paragraph violates Article I, Section 8, Clause 3 of the Constitution of the United States, the so-called "dormant" Commerce Clause; (2) enjoin the Commissioner from enforcing the provisions of the Second Paragraph; and (3) enjoin Atlas from protesting the establishment of a Yamaha motorcycle dealership in Russell County.

The Federal Court determined that resolution of Yamaha's constitutional challenge depends upon the proper interpretation of the Second Paragraph. Accordingly, the Federal Court certified the following questions of law:

> "1. Whether the Second Paragraph grants to every existing Virginia franchised dealer of a line-make of motorcycles the right to receive

forty-five days' advance notice of, and to protest, the establishment of any new or additional motorcycle dealer franchise of the same line-make in any county, city or town of Virginia, thereby placing on the manufacturer the burden of proving, in a formal evidentiary hearing, 'inadequate representation' of its line-make of motorcycles throughout the Commonwealth before it may proceed to establish that dealership?

"2. Whether the Commissioner was correct in interpreting the Second Paragraph in a manner such that only those protesting franchised dealers who make a preliminary showing that they actually are representing, 'in a not insubstantial way,' the line-make of motorcycles in the 'county, city or town' where the proposed new or additional dealer would be located will qualify for a formal evidentiary hearing in which the manufacturer would bear the burden of proving 'inadequate representation' of that line-make, by the protesting franchised dealer, in that 'county, city or town?'

"3. Whether the Second Paragraph should be interpreted to make the advance notice and protest rights granted therein applicable to only existing franchised dealers of a line-make of motorcycles which are located in the same 'county, city or town' in which a proposed new or additional motorcycle dealer franchise of the same line-make would be established, and to limit the burden on the manufacturer to proving 'inadequate representation' of its line-make merely in that 'county, city or town?'

"4. If none of the three aforementioned interpretations of the Second Paragraph is correct, what is the correct interpretation of the statute?"

II

Code § 46.2-1993.67(5), a part of the Motor Vehicle Code, contains two paragraphs. Pursuant to the first paragraph, an existing motorcycle dealer has the right to protest the establishment of a new dealership of the same line-make of motorcycles within its "relevant market area," which is defined, in Code § 46.2-1993, as 7-, 10-, 15-, or 20-mile radii around the existing dealer's location, depending on population densities (the First Paragraph). The First Paragraph further provides that no new dealership may be established "unless the Commissioner has determined, if requested by a dealer of the same line-make in the relevant market area . . . , and after a hearing on the matter, that there is reasonable evidence that after the grant of the new franchise, the market will support all of the dealers in that line-make in the relevant market area."

The Second Paragraph, enacted subsequent to the First Paragraph in 1997, provides, in pertinent part, as follows:

> No new or additional motorcycle dealer franchise shall be established in any county, city or town unless the manufacturer . . . gives advance notice to any existing franchised dealers of the same line-make. The notice shall be in writing and sent by certified mail, return receipt requested, at least forty-five days prior to the establishment of the new or additional franchise. Any existing franchise dealer may file a protest within thirty days of the date the notice is received. The burden of proof in establishing inadequate representation of such line-make motorcycles shall be on the manufacturer. . . .

Yamaha seeks to establish a new motorcycle dealer franchise at Rosedale, which is located in Russell County.

The proposed new dealer is a dealer of Suzuki-brand motorcycles and desires to add Yamaha-brand motorcycles to its product line.

Atlas is located in the City of Bristol and has been representing Yamaha in far Southwest Virginia for many years. In addition to Atlas, there is one other Yamaha dealer in Southwest Virginia, located in the Town of Wytheville.

At various times, Yamaha has expressed the view that Atlas' target market encompasses the area within a 30-mile radius of its location in Bristol. Most of Russell County and all or portions of more than a dozen other counties, cities, and towns are located within that 30-mile radius.

In 1999, Atlas, to better serve its target market, expanded its dealership by 14,500 square feet, at a cost of approximately $345,000, and hired additional personnel. Yamaha proposed to establish the new dealer in Russell County about the time Atlas was completing its expansion.

In compliance with the Second Paragraph, Yamaha gave notice of the proposed new dealer to Atlas and to Yamaha's 25 other existing Virginia dealers. Atlas then sent a letter of protest to the Commissioner.

Yamaha challenged Atlas' standing to protest the establishment of the new dealer, arguing that Atlas did not fall within the "relevant market area," as defined by the First Paragraph. Yamaha asserted that the Second Paragraph should be read to restrict protest rights to those existing dealers of the Yamaha brand located in the same city, county, or town as the proposed new dealer.

The Commissioner rejected Yamaha's assertion and determined that Atlas met the threshold standing requirement. The Commissioner further determined, however, that Atlas, in order to obtain a formal evidentiary hearing, must show a substantial level of sales activity in Russell County.

The Commissioner determined, based on sales data submitted by Atlas and Yamaha, that Atlas had made a sufficient showing that it is actually representing Yamaha in Russell County and, therefore, is entitled to a formal hearing. In so deciding, the Commissioner stated, in pertinent part, the following:

> Although the language is not as artfully drawn as might have been desirable, it is clear that the primary objective of [the Second Paragraph] was to afford added protection to motorcycle dealers, above and beyond the relevant market area protection provided by [the First] Paragraph. . . . It is not entirely clear why such additional protection was provided only in the motorcycle dealer provisions and not in the motor vehicle dealer provisions (Va. Code § 46.2-1569), but presumably the 10, 15 and 20 mile limits on the definition of relevant market area applicable to both motorcycles and motor vehicles (*compare* Va. Code § 46.2-1500 to § 46.2-1993) might be considered less meaningful geographic limits for motorcycle dealers because there are far fewer franchised motorcycle dealers than motor vehicle dealers in Virginia. . . . Hence, it would be rational to assume that motorcycle dealers may need a larger sales territory in order to survive and that the 10, 15 and 20 mile limits for relevant market area protections are less appropriate for motorcycle dealers.

The Commissioner also determined that the Second Paragraph requires a motorcycle manufacturer to give at least forty-five days' notice of a proposed new dealer to every existing dealer of the same line-make in Virginia and that each existing dealer has an unqualified right to file a protest. However, the Commissioner reasoned that,

> [i]f the existing dealer sells no motorcycles in that county, city or town, then there is no need to hold a formal evidentiary hearing to determine that the dealer is inadequately representing the franchisor there. No representation at all by the dealer, as a matter of law, must be considered "inadequate representation" in that county, city or town, and it would be unreasonable to require that a formal evidentiary hearing be held in order to arrive at that conclusion.

Therefore, the Commissioner interpreted the Second Paragraph to require a protesting dealer to make a preliminary showing that it represents, "in a not insignificant or insubstantial way," the same line-make motorcycles in the county, city, or town where the proposed new dealer would be located. The Commissioner would then decide on a case-by-case basis through an informal fact-finding proceeding, conducted pursuant to Code §§ 2.2-4019 and -4020(B) of the Virginia Administrative Process Act, whether to grant a formal evidentiary hearing under the Second Paragraph.

The Commissioner further determined that, if a formal evidentiary hearing is granted, the Second Paragraph requires the manufacturer to prove inadequate representation of its motorcycles based on the factors set forth in Code § 46.2-1993.73(D). That statute provides the following:

For purposes of any matter brought to the Commissioner under subdivisions 3, 4, 5, 6 and 9 of § 46.2-1993.67 with respect to which the Commissioner is to determine whether there is good cause for a proposed action or whether it would be unreasonable under the circumstances, the Commissioner shall consider:

1. The volume of the affected dealer's business in the relevant market area;

2. The nature and extent of the dealer's investment in its business;

3. The adequacy of the dealer's service facilities, equipment, parts, supplies, and personnel;

4. The effect of the proposed action on the community;

5. The extent and quality of the dealer's service under motorcycle warranties;

6. The dealer's performance under the terms of its franchise; and

7. Other economic and geographical factors reasonably associated with the proposed action.

In addition, the Commissioner suggested that "market penetration" should be considered in determining "inadequate representation."

III

Yamaha contends that the Second Paragraph should be interpreted so that the phrase, "county, city or town," which is found in the first sentence, applies throughout the remainder of the Second Paragraph. Thus, according to Yamaha, only those existing dealers located in the same county, city, or town as the proposed new dealer would be

afforded notice, allowed to file a protest, and granted a formal evidentiary hearing. Further, in such hearing, the manufacturer would bear the burden of proving inadequate representation of its line-make only in that county, city, or town. Therefore, Yamaha urges us to answer Certified Question Three in the affirmative.

Atlas urges us to adopt, with one exception, the Commissioner's interpretation of the Second Paragraph. Atlas would have us require the manufacturer to bear the burden of proving inadequate representation in "the market area likely to be served by the new dealer," rather than in the county, city, or town in which the proposed new dealer would be located. Thus, as restated by Atlas, Certified Question Two would read as follows:

> Should the Second Paragraph, and the statutory scheme of which it is a part, be interpreted to mean that only those protesting franchised dealers who make a preliminary showing that they are actually representing "in a not insubstantial way" the line-make of motorcycles in the county, city or town in which the proposed new dealer would be located will qualify for a formal evidentiary hearing in which the manufacturer would bear the burden of proving inadequate representation of that line-make by the protesting dealer in *the market area likely to be served by the new dealer?*
>
> (Emphasis added.)

IV

A

In construing the statute at issue, we are guided by a number of well-established rules. First and foremost, we

endeavor to determine the intent of the General Assembly as gleaned from the words in the statute. *Va. Society for Human Life v. Caldwell,* 256 Va. 151, 156, 500 S.E.2d 814, 816 (1998). If, however, the words in the statute are not sufficiently explicit, we may determine legislative intent "from the occasion and necessity of the statute being passed [or amended]; from a comparison of its several parts and of other acts *in pari materia;* and sometimes from extraneous circumstances which may throw light on the subject." *Richmond v. Sutherland,* 114 Va. 688, 691, 77 S.E. 470, 471 (1913). Furthermore, the construction of a statute by the official charged with its administration, though not binding on us, is entitled to great weight. *Commonwealth v. General Electric Company,* 236 Va. 54, 64, 372 S.E.2d 599, 605 (1988); *Winchester TV Cable v. State Tax Com.,* 216 Va. 286, 290, 217 S.E.2d 885, 889 (1975).

Additionally, when the constitutionality of a statute is challenged, we are guided by the principle that all acts of the General Assembly are presumed to be constitutional. *Caldwell,* 256 Va. at 156-57, 500 S.E.2d at 816; *Hess v. Snyder Hunt Corporation,* 240 Va. 49, 52, 392 S.E.2d 817, 820 (1990). Therefore, "a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible." *Eaton v. Davis,* 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940).

B

In the light of these principles, we will endeavor to determine the General Assembly's intent in enacting the Second Paragraph. At the outset, we agree with the Commissioner's observation that, "[a]lthough the language

[in the Second Paragraph] is not . . . artfully drawn . . . , it is clear that the primary objective of [the Second Paragraph] was to afford added protection to motorcycle dealers, above and beyond the relevant market area protection provided by [the First] Paragraph."

We also agree with the Commissioner's observation that the Second Paragraph leaves certain matters unstated. The Second Paragraph does not expressly require a formal evidentiary hearing. While it does provide that a manufacturer has the burden of proof in establishing inadequate representation, this may occur in either a formal evidentiary hearing pursuant to Code § 2.2-4020, or an informal fact-finding proceeding under Code § 2.2-4019. Thus, it is reasonable to conclude that the Commissioner has discretion in determining whether a formal evidentiary hearing would be appropriate. Indeed, we have consistently held that a threshold standing determination ensures "that the person who asserts a position has a substantial legal right to do so and that his rights will be affected by the disposition of the case." *Cupp v. Board of Supervisors,* 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984).

The Second Paragraph also does not expressly limit the rights to notice and protest only to existing dealers of the same line-make in the county, city, or town wherein the proposed new dealer would be located. We think it is clear, therefore, that the phrase "any existing franchised dealer" in the Second Paragraph means any existing dealer of the same line-make of motorcycles in the Commonwealth of Virginia.

In addition, the Second Paragraph does not expressly state the geographical parameters within which the manufacturer must prove inadequate representation.

Arguably, absent a geographic modifier, inadequate representation would have to be proved throughout the Commonwealth; however, this interpretation would likely violate the Commerce Clause of the Federal Constitution. As the Commissioner correctly asserts, "such an interpretation would not appear rationally related to the legislative intent to protect individual dealers from the economic power of manufacturers."

While we agree with the Commissioner that the Second Paragraph does not require proof of inadequate representation on a statewide basis, we do not agree that proof of inadequate representation should be limited to the same county, city, or town in which the proposed new dealer would be located. Such a limitation is not found in the Second Paragraph and conflicts with legislative intent. As Atlas correctly observes, "[t]he intent of the legislature was to provide motorcycle dealers a protest opportunity *not* limited by the arbitrary mileage restrictions of the First Paragraph." We also agree with Atlas that limiting proof of inadequate representation to such county, city, or town "invites absurd outcomes in which the purpose of the Second Paragraph could easily be evaded."[1]

---

[1] For example, an existing dealer located within the City of Richmond would have no protest rights or opportunity to litigate the representation issue pursuant to the Second Paragraph with regard to a proposed new dealer located only a few blocks away, but in Henrico County. That same dealer, however, would automatically get a hearing pursuant to the First Paragraph. If the proposed new dealer were located as many as 20 miles away but within the City of Richmond, the existing dealer would have protest rights under both the First Paragraph and the Second Paragraph. In the first situation, in which destructive intrabrand competition is more likely, the existing dealer's options are restricted. In the second situation, in which destructive

(Continued on following page)

C

For these reasons, we reject Yamaha's interpretation of the Second Paragraph. If we were to answer Certified Question Three in the affirmative, as Yamaha urges, we effectively would render the Second Paragraph superfluous.

V

In conclusion, we will restate Certified Question Two as set forth above in Part III of this opinion and answer it in the affirmative. We answer Certified Questions One and Three in the negative, and we determine that Certified Question Four is inapplicable.[2]

Certified Question Two restated and answered in the affirmative.

Certified Questions One and Three answered in the negative.

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intrabrand competition is less likely, the existing dealer's options are not restricted.

[2] None of the parties advocated that Certified Question One be answered in the affirmative.

Supreme Court, U.S.
FILED
AUG 18 2005
OFFICE OF THE CLERK

(2)

No. 05-96

IN THE

Supreme Court of the United States

DEMERST B. SMIT, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles,
Petitioner,

v.

YAMAHA MOTOR CORPORATION, U.S.A. and JIM'S MOTORCYCLE, INCORPORATED, d/b/a ATLAS HONDA/YAMAHA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT YAMAHA MOTOR CORPORATION, U.S.A.'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether a Virginia motorcycle dealer establishment statute, which was stipulated to have no parallel in the law of any other state, violated the dormant Commerce Clause by erecting "uniquely anti-competitive," statewide market entry barriers that impeded the flow of new motorcycles and associated products into the Commonwealth.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of this Court, Yamaha Motor Corporation, U.S.A. states as follows:

> Yamaha Motor Company, Limited owns 100% of the stock of Yamaha Motor Corporation, U.S.A. Yamaha Motor Company, Limited has issued shares to the public.

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IN THE

Supreme Court of the United States

No. 05-96

DEMERST B. SMIT, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles,

Petitioner,

v.

YAMAHA MOTOR CORPORATION, U.S.A. and JIM'S MOTORCYCLE, INCORPORATED, d/b/a ATLAS HONDA/YAMAHA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT YAMAHA MOTOR CORPORATION, U.S.A.'S BRIEF IN OPPOSITION TO PETITION

Respondent Yamaha Motor Corporation, U.S.A. ("Yamaha") respectfully opposes the Petition of Demerst B. Smit, in his official capacity as the Commissioner of the Virginia Department of Motor Vehicles ("Commissioner"), for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit").

INTRODUCTION

The Commissioner seeks review of a decision applying this Court's settled dormant Commerce Clause precedents to a

Virginia motorcycle dealer establishment statute that "'has no parallel in the law of any other state.'" Appendix to Petition ("App.") at 18 (citation omitted). Based on extensive record evidence, a panel of the Fourth Circuit unanimously held that the challenged provision was "uniquely anti-competitive even as dealer protection laws go," *id.*, and imposed "severe" burdens on interstate trade that were clearly excessive in light of the "weak" and illusory local benefits suggested by the Commissioner. *Id* at 18, 23. The decision followed established precedent, reached a correct result, and affects only this singularly protectionist Virginia statute. The Petition presents no issue warranting the Court's consideration and should therefore be denied.

STATEMENT OF THE CASE

Section 46.2-1993.67(5) of the Code of Virginia contains two paragraphs that afford economic protection to existing motorcycle dealers by restricting the establishment of new dealerships. The first paragraph ("First Paragraph") is conventional among state dealer establishment laws. *Id* at 3. It grants existing dealers the right to protest the placement of a new dealer of the same line-make within their "relevant market areas," which are generally defined as ten, fifteen, or twenty mile radii around the existing dealers' locations depending on population densities. *Id.* A protest under the First Paragraph requires the Commissioner to determine whether the relevant market of an incumbent dealer will support another dealer of the same line-make. "The First Paragraph closely tracks the language of Virginia's motor vehicle franchise statute that [the Fourth Circuit] upheld against a dormant Commerce Clause challenge in *American Motors Sales Corp. v. Division of Motor Vehicles*, 592 F.2d 219 (4th Cir. 1979)." *Id.*

The second paragraph ("Second Paragraph") of Section 46.2-1993.67(5) was enacted in 1997 and is the provision

more recently considered by the Fourth Circuit in this case. The Second Paragraph is radically different from the First Paragraph and all other state dealer protection laws. *Id.* at 18-19. It "grants 'any existing franchised dealer' in Virginia the right to protest whenever a manufacturer seeks to authorize a new dealership *anywhere in the Commonwealth* that would sell the same line-make as the existing dealer." *Id.* at 7 (citation omitted) (emphasis in original). As the Fourth Circuit observed, "[u]nder the Second Paragraph, as it stands, an existing dealer at one end of Virginia can protest a proposed dealership some 500 miles away at the other end of the state." *Id.* at 24. "[O]nce a protest moves to a formal evidentiary hearing, the manufacturer must prove 'inadequate representation . . . in the market area likely to be served by the new dealer.'" *Id.* at 7 (citation omitted). Under this regulatory scheme, which includes rights of appeal, "'even a frivolous protest to which the Commissioner responds with uncharacteristic dispatch *could take years to resolve* . . . .'" *Id.* at 8 (citation omitted) (emphasis in original).

Yamaha brought this action challenging the Second Paragraph on dormant Commerce Clause grounds.[1] Under this Court's precedents, "[a]nalysis of a dormant Commerce Clause challenge to a state statute proceeds on two tiers, a discrimination tier and an undue burden tier." *Id.* at 11 (citation omitted).

A. Discriminatory Effects Analysis

The record showed that the Second Paragraph was not enacted to address oversaturation of incumbent Virginia dealers' markets with new dealerships or any other oppressive practice by manufacturers. Rather, the statute was promoted

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[1] For brevity, Yamaha incorporates by reference the statement of facts in the Fourth Circuit's decision further describing the proceedings below. App at 3-10.

by the Virginia Motorcycle Dealers Association "at a time of record motorcycle sales nationwide." *Id.* at 4, 33. This growth in sales had led incumbent dealers in Virginia and other states to demand greater allocations of top-selling motorcycle models from manufacturers. *Id.* at 4. The trial evidence demonstrated that Second Paragraph protests

> were "virtually certain" to occur in response to any proposal for a new dealership. Expert economists [for both parties] testified that, given the tight supply of top-selling motorcycles, "an existing dealer has the economic incentive to file a protest of questionable merit in order to gain bargaining leverage" with manufacturers.

Id. at 9 (citation omitted). In one case, for example, an incumbent Virginia dealer offered "to drop its [Second Paragraph] protest in exchange for a sixty percent increase in bike allocation and the conversion of a secondary retail location into a full dealership." *Id.* at 14.

Manufacturers are required by Virginia and other state laws to allocate motorcycle models equitably in their national dealer distribution programs. *Id.* at 13, 59 n.10. These laws are expressly intended to prohibit manufacturers from favoring dealers in certain states or regions during periods of high product demand. Yamaha showed that placating incumbent Virginia dealers who file Second Paragraph protests with additional allocations of top-selling units would necessarily come at the expense of out-of-state dealers, affording the very type of preferential treatment to Virginia dealers prohibited by such state laws.

The District Court found that the potential discriminatory effects on interstate trade identified by Yamaha were "plausible," but too speculative to support a *per se* challenge to the Second Paragraph because Yamaha had refused to date to accede to such "extortionate allocation demands." App. at

14, 60-61. The Fourth Circuit agreed and did not disturb the District Court's ruling on this aspect of the case. *Id.* at 14.

B. *Pike* Analysis

Even so, the Fourth Circuit had no difficulty finding that the Second Paragraph imposed undue burdens on interstate commerce. Applying the analysis established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the Fourth Circuit held that the Second Paragraph served a legitimate local purpose. The Fourth Circuit noted that the right of Virginia and other states to enact laws protecting motor vehicle dealers from "'unfair or oppressive trade practices'" by manufacturers was established in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). App. at 16. The Fourth Circuit followed *Orrin Fox* in upholding the predecessor to the First Paragraph in *American Motors*. *Id.* at 16-17. Although there was no legislative statement or history explaining the Second Paragraph, the Fourth Circuit declined to "second-guess" the intention of the Virginia General Assembly and concluded that the statute was enacted for the same legitimate local purpose as the First Paragraph. *Id.* at 15.

The Fourth Circuit likewise applied a deferential standard in considering the Second Paragraph's putative benefits. *Id.* The Commissioner contended that the statute "serves precisely the same legitimate state interests served by the dealer protection statutes at issue in [*Orrin*] *Fox* and *American Motors*. Those explanations of the legitimate interest advanced by the second paragraph also describe the putative local benefits that flow from the second paragraph." *Id.* at 18 (citation omitted). Apart from this circular argument, the Commissioner could offer no evidence to show why the unprecedented statewide protest rights granted to every incumbent dealer under the Second Paragraph were necessary to promote the same putative benefits already provided under the First Paragraph.

While noting that it had "[o]nly rarely . . . doubted a statute's putative benefits," the Fourth Circuit held that the "weak" and speculative benefits of the Second Paragraph were clearly outweighed by the "severe" burdens on interstate commerce created by the regulatory scheme. *Id.* The "excessive breadth" of the Second Paragraph created "a barrier to market entry . . . unparalleled in scope." *Id.* at 23. As the Fourth Circuit explained:

> In other states with dealer protection statutes, a manufacturer can reasonably anticipate the regions where it might be susceptible to a protest and can plan its expansion accordingly. In Virginia, however, a manufacturer has no way of avoiding the Second Paragraph's reach: targeting an underserved area of the Commonwealth will not spare it a protest . . . . Thus, manufacturers cannot plan franchise expansion in Virginia as they can in other states; instead, they are forced to play a waiting game that could take years.

Id. at 19. The evidence showed that the "chilling effect of [Second Paragraph] protests and potential protests on new dealership openings in Virginia" had caused Yamaha and other motorcycle manufacturers "'to forego [all efforts to] establish[] new dealers in Virginia.'" even though the demand for motorcycles continued to increase. *Id.* at 20 (citation omitted) (bracketed text in original). As a consequence, manufacturers were unable to distribute additional motorcycles and associated products to new retail outlets in the Commonwealth, resulting in "'a relative reduction in intrabrand and interbrand competition.'" *Id.* (citation omitted). Based on this record, the Fourth Circuit correctly determined that the Second Paragraph violated the dormant Commerce Clause.[3]

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[3] The District Court found that the Second Paragraph created significant burdens on interstate commerce, but ruled that such burdens are only "cognizable" under the dormant Commerce Clause if the challenged state

In the Petition, the Commissioner asserts that the statewide market entry barriers created by the Second Paragraph only affected the establishment of new dealerships and not the flow of motorcycles into Virginia. Pet. at 13-14 n.12. This misstates the trial record and oversimplifies the Fourth Circuit's analysis. Like many other states, Virginia prohibits manufacturers both from (1) operating their own retail outlets, Va. Code Ann. § 46.2-1993.71; and (2) failing to allocate an equitable share of new products in their national distribution programs to existing local dealers, *id.* § 46.2-1993.67(9). Given these restrictions, a manufacturer cannot simply ply incumbent Virginia dealers with preferential allocations of top-selling models to increase the market presence for its line-make in the Commonwealth --however beneficial that might be to the incumbent dealers' profits. The establishment of new dealerships is the only lawful way that a manufacturer can expand its market presence. By preventing Yamaha and other

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law regulates in an area "where there is a compelling need for national uniformity." App. at 21. The Fourth Circuit reversed, correctly noting that the burdens on interstate commerce created by the Second Paragraph were indistinguishable from the types of burdens considered by this Court in other *Pike* cases. *Id.* at 21-22 (cataloging cases). Even so, there were sufficient grounds to invalidate the statute even under the District Court's more restrictive view of the dormant Commerce Clause. As noted above, Virginia's equitable allocation law like similar state laws prohibits manufacturers from failing to distribute a fair share of top-selling motorcycles to incumbent Virginia dealers. These statutes reflect the importance of fair and uniform product allocation practices in the national economy and are designed to ensure that manufacturers do not favor dealers in any particular states or regions. By empowering incumbent Virginia dealers to use their protest rights to "extort" more top-selling units from manufacturers, the Second Paragraph encouraged the very type of conduct that Virginia would not tolerate if engaged in by manufacturers and dealers in other states. *Cf. H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949) (noting, for example, that the dormant Commerce Clause protects against "Michigan provid[ing] that automobiles cannot be taken out of the State until local dealers' demands are fully met").